19

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 354.

THE HOLDEN LAND AND LIVE STOCK COMPANY, WILLIAM D. McLEOD, ADMINISTRATOR WITH THE WILL ANNEXED OF HOWARD M. HOLDEN, DECEASED, AND MARY F. HOLDEN, WIDOW, AND WILLIAM M. HOLDEN, BERTHA L. LAUTENBACH, AND HALE HOLDEN, HEIRS-AT-LAW OF HOWARD M. HOLDEN, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE INTERSTATE TRADING COMPANY, THE NATIONAL BANK OF COMMERCE OF KANSAS CITY, MISSOURI, AND GEORGE T. CUTTS, RECEIVER OF SAID BANK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED OCTOBER 7, 1913.

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4 In the Supreme Court of the State of Kansas.

No. 17828.

THE HOLDEN LAND & LIVE STOCK COMPANY et al., Appellants,
vs.
THE INTER-STATE TRADING COMPANY et al., Appellees.

Be it remembered, That on the 30th day of August 1911, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas a Notice of Appeal together with an acknowledgment of service, endorsed thereon, which are in the words and figures as follows, to-wit:

5 In the District Court of Shawnee County, Kansas.

THE HOLDEN LAND & LIVE STOCK COMPANY and HOWARD M. HOLDEN, Plaintiffs,
vs.
THE INTER-STATE TRADING COMPANY, THE NATIONAL BANK OF Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Defendants.

Notice of Appeal.

To the Interstate Trading Company, The National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, and to John S. Dean, their Attorney of Record:

You and each of you are hereby notified that the plaintiffs in the above entitled cause, The Holden Land & Live Stock Company and Howard M. Holden hereby appeal from the judgment of this Court entered in this case and appeal from the orders of this court, dated April 13, 1911 and June 1, 1911, overruling the exceptions of these plaintiffs to the report of the referee filed herein, and the motions of these plaintiffs for a new trial herein and the order affirming the report of the referee and appeal from the orders of this court of date June 17, 1911 overruling the motions of said plaintiffs for a new trial of this cause.

Dated at Topeka, Kansas, this 26th day of August, 1911.

E. P. GARNETT,
CHAS. BLOOD SMITH,
SAM'L BARNUM,
Attorneys for Plaintiffs.

(Endorsed on back:) 17828. The Holden Land & Live Stock Co. et al., Appellants vs. The Inter-State Trading Co. et al., Appellees. Notice of appeal. Filed Aug. 30, 1911. D. A. Valentine, Clerk Supreme Court.

c Service of the foregoing notice of appeal is hereby acknowledged this 28th day of August 1911.

ELIJAH ROBINSON,
JOHN S. DEAN,
Attorneys for Defendants.

STATE OF KANSAS,
Shawnee County, ss:

Samuel Barnum, being first duly sworn upon his oath, deposes and says:

That he served the above and foregoing notice of appeal upon John S. Dean, the Attorney of Record for the defendants in the above entitled action, by delivering a true and correct copy of said notice of appeal to the said John S. Dean on the 28th day of August, A. D. 1911; that this affiant is one of the attorneys for the plaintiffs in said action entitled the Holden Land and Live Stock Company et al. against the Inter-State Trading Company, et al., #24833, which is the action in which said notice of appeal is served and that said affiant is duly authorized to serve said notice, and further affiant saith not. SAMUEL BARNUM.

Subscribed and sworn to before me this 28th day of August, 1911.
[SEAL.] R. L. THOMAS,
Clerk District Court.

Endorsements: No. 24833. Shawnee County District Court. The Holden Land & Live Stock Co. et al. vs. The Inter-State Trading Co. et al. Notice and service of appeal. Filed Aug. 28, 1911. R. L. Thomas, Clerk District Court. Rossington & Smith, Attorneys for Plaintiffs.

d And also on the 4th day of January, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the appellants' Abstract of the Record, which with all the endorsements thereon is in the words and figures as follows, to-wit:

e Filed Jan. 4, 1912. D. A. Valentine, Clerk Supreme Court.

No. 17828.

In the Supreme Court of Kansas.

No. 17828.

HOLDEN LAND AND LIVE STOCK COMPANY and HOWARD M. HOLDEN, Plaintiffs,

vs.

THE INTER-STATE TRADING COMPANY, THE NATIONAL BANK OF Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Defendants.

Abstract of Record.

CHAS. BLOOD SMITH AND
EDWARD P. GARNETT,
Attorneys for Appellants.

1 In the Supreme Court of Kansas.

HOLDEN LAND AND LIVE STOCK COMPANY and HOWARD M. HOLDEN, Plaintiffs,

vs.

THE INTER-STATE TRADING COMPANY, THE NATIONAL BANK OF Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Defendants.

Abstract of Record.

Petition filed February 13, 1908, in the District Court of Shawnee County, Kansas. The cause was tried on the following pleadings (caption omitted):

"Second Amended Petition."

Come now the above named plaintiffs, and leave of court being had, file this, their second amended petition, and state:

That the Holden Land and Live Stock Company, plaintiff, is and was at all times hereinafter mentioned a corporation, duly or-
2 ganized and existing under the laws of the State of Missouri, and as such duly qualified to transact business in the State of Kansas under and by virtue of the laws of the State of Kansas; that the said Howard M. Holden is a resident of the City of Kansas City, State of Missouri; that the Inter-State Trading Company is and was at all times hereinafter mentioned a corporation duly incorporated under the laws of the State of Missouri; that the National Bank of Commerce of Kansas City, Missouri is and was at all times hereinafter mentioned a National Bank located and doing business at Kansas City in the State of Missouri, and as such was organized and incorporated under the National Banking Laws of the United States, and that the defendant George T. Cutts, was the duly appointed, qualified and acting receiver of said National Bank of Commerce.

Plaintiffs, for their cause of action against the defendants, state that one of the plaintiffs, the said Holden Land and Live Stock Company, was, on and long prior to the first day of July, 1901, the owner and in possession of the following described lands in Shawnee County, Kansas, to-wit:

All of Section one (1), except that part of the west half of the west half thereof lying north of the Union Pacific Railroad right of way; the south half of the southwest quarter of Section two (2); the south half of the southeast quarter of Section eleven (11); all of Section twelve (12); all of Section thirteen (13) north of the Kansas
3 River; the northeast quarter, the north half of the southeast quarter, and the south half of the southwest quarter of Section fourteen (14), all in Township eleven (11), of Range thirteen (13); also the east half of the southwest quarter, and the southeast quarter of Section twelve (12), and the southeast quarter

of Section thirty-six (36), all in Township ten (10), Range thirteen (13); also,

The east half of the southwest quarter of Section five (5); all of Section thirty (30), all of Section thirty-one (31), and the south half of Section thirty-two (32), all in Township ten (10), of Range fourteen (14); also,

The west half of the northeast quarter; the northeast quarter of the southwest quarter, and the northwest quarter of Section five (5); all of Section six (6) except a tract of about three (3) acres, commencing at a stake fifty (50) feet north of the Kansas (Union) Pacific Railroad on the line between the Ranges thirteen (13) and fourteen (14); running thence south, seventy-one (71) degrees east parallel with said railroad, three hundred thirty-seven (337) feet to a stake; thence south seventy-six degrees one minute (1) and fifty (50) seconds east, one hundred fifty (150) feet to a stake sixty-four (64) feet north of said railroad; thence south, seventy-four (74) degrees east, nine hundred eighty (980) feet to a stake sixty-nine (69) feet north of said railroad; thence south, sixty-nine (69) degrees east, to a stake fifty (50) feet north of said railroad; thence south to the center of said railroad track; thence north seventy-one (71) degrees west, to the said Range line; thence north fifty
4 (50) feet to the place of beginning; the west half and all of the east half lying north of the Union Pacific Railroad of Section seven (7), and the west half of Section eighteen (18), all in Township eleven (11), of Range fourteen (14).

Subject to the rights of way of the Union Pacific Railroad Company and the Chicago, Rock Island and Pacific Railroad Company now crossing said land.

The above described land containing in all five thousand, six hundred three and forty-four hundredths (5,603.44) acres, and being then and there of the value of two hundred forty thousand dollars ($240,000.00).

That said Holden Land and Live Stock Company by its certain deed of mortgage, dated July 1, 1901, and duly recorded in the office of the Register of Deeds of said Shawnee County, Kansas, in Book 284, page 126, conveyed to its co-plaintiff, Howard M. Holden, said above described lands to secure the payment of its note to said Holden for the sum of eighty-two thousand dollars ($82,000.00), dated July 1, 1901, and payable one year after date, with interest from maturity at the rate of eight per cent per annum; said mortgage being made subject to a mortgage of ninety thousand dollars ($90,000.00) given on said land by said Holden Land and Live Stock Company, to the Mutual Benefit Life Insurance Company on June 6, 1901; that one of said plaintiffs, the said Howard M. Holden, on the said first day of July, 1901, executed and delivered to the said National Bank of Commerce his note of that date for the
5 sum of eighty thousand dollars ($80,000.00) payable one year after date, with interest from maturity at the rate of eight per cent per annum, and delivered to and deposited with said Bank the said note of the Holden Land and Live Stock Company

for eighty-two thousand dollars ($82,000.00) as collateral security for the payment thereof. Plaintiffs say that the said $80,000.00 note given by said Holden to said Bank was renewed from time to time and various payments of principal and interest made by said Holden from the proceeds of the sales of said real estate of said Holden Land and Live Stock Company until the 8th day of March, 1904, when the said Bank claimed there was still due it from said Holden the sum of seventy-seven thousand, eight hundred seventy-three dollars and ninety cents ($77,873.90) as balance of said $80,000.00 note and interest, and required the said Holden to execute to it his note of that date for $77,873.90, due in thirty days, with interest from maturity at the rate of eight per cent per annum as hereinafter set forth, and for the payment of which the said bank still claimed to hold the said $82,000.00 note and mortgage of the Holden Land and Live Stock Company as collateral security, together with other collaterals deposited with it by the said Howard M. Holden.

Plaintiffs state that said defendant Bank on said July 1, 1901, out of said note of $80,000.00 executed by said Holden as aforesaid, knowingly, unlawfully, and corruptly took, received, reserved, and charged said Holden as interest on said note the sum of
6 $6,897.78 in cash which was deducted from the face of said note leaving only the sum of $73,102.22 received by said Holden from said Bank as the net proceeds of said note, the sum so reserved by and paid to said Bank being for interest calculated, taken, received, reserved and charged as aforesaid in advance for one year at a rate greater than is and was at that time allowed by the laws of the State of Missouri in which said Bank is and was located; that under the laws of the State of Missouri, Section 3705 of the Revised Statutes of Missouri of 1899 said Bank was only allowed to charge "interest at the rate of six per cent per annum when no other rate was agreed upon for all moneys after they become due and payable on written contracts and on accounts after they become due and demand of payment is made;" that Section 3706 of said Revised Statutes of Missouri provided that "parties may agree in writing for the payment of interest not exceeding eight per cent per annum on money due or to become due on any contract" and Section 3711 of said Revised Statutes provided that "parties may contract in writing for the payment of interest upon interest but the interest shall not be compounded oftener than once a year;" that the laws of the State of Missouri allow no greater rate of interest to be charged than is provided in the aforesaid sections; that it is and was then provided by the National Banking laws of the United States, Section 5197, that a National Bank "may take, receive, reserve and charge upon any loan or discount made, or upon any note, bill of exchange or any other evidence of debt interest at the rate
7 allowed by the laws of the State, territory or district where the Bank is located, and no more, except where by the laws of the State a different rate is limited to banks of issue organized under state laws the rates so limited shall be allowed for associations organized or existing in any such state under this title," and plaintiffs say that there are and were then no laws of the State of Mis-

souri where a different rate is limited for banks of issue organized under state laws; that Section 5198 of said National Banking Act provides that "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon."

Wherefore plaintiffs say that by knowingly charging said Holden on said $80,000.00 note in manner and form aforesaid, interest at a greater rate than was allowed by the laws of Missouri, the defendant Bank forfeited all right to charge or receive any interest on said note under the laws of the United States and is and was not entitled to collect nor to receive on said note nor on any renewals thereof any interest whatsoever; that said Bank was entitled to receive of said Holden on account of said usurious transaction only the net sum of $73,102.22, which it paid to said Holden thereon, and that said Bank under said laws forfeited all right to receive any sum whatsoever as interest on said transaction or on transactions
8 between said Bank and said Holden growing out of the same.

Plaintiffs say that Plaintiff Holden paid to said Bank on said $80,000.00 note divers sums of money between the 1st day of July, 1902, and the 17th day of June, 1903, amounting in all to the sum of $12,062.63, which said Holden paid on said note up to that date and which sum of money taken from the principal sum due by said Holden on said note of $73,102.22 left the amount of $61,040.19 due by said Holden to said Bank on June 17, 1903. Plaintiffs say that notwithstanding the premises the said defendant Bank required of said Holden on the said 17th day of June, 1903, to execute to said Bank in renewal of said $80,000.00 note a new note for the sum of $72,891.30 dated June 17, 1903, and payable thirty days after date with interest from maturity at the rate of eight per cent per annum payable annually, and also to execute another new note dated June 17, 1903, for the sum of $1,586.85 and payable thirty days after date with interest from maturity at the rate of eight per cent per annum payable annually; that both of said notes were given in renewal of said $80,000.00 note and that the usurious interest carried with and agreed to be paid on said $80,000.00 note was computed and carried into and formed a part of the said note for $72,891.30 and formed the whole of the said note for $1,586.85; that the defendant Bank in taking said renewal notes was guilty of knowingly and corruptly taking, receiving, reserving and charging
a rate of interest greater than was allowed by the laws of Mis-
9 souri; that in addition to the usury carried by and calculated on the $80,000.00 note which formed a part of said renewal notes, the said note contained a charge for interest at the rate of eight per cent per annum compounded oftener than once a year, contrary to the laws of Missouri, that is to say the defendant Bank charged said Holden interest on the balance claimed to be due on the $80,000.00 note, including its usurious interest, from April 17, 1903, to June 17, 1903, at the rate of eight per cent per annum and added this interest to the said balance claimed to be due and took from the

plaintiff Holden the said renewal note for $72,891.30 to represent the principal sum, and charged the said Holden interest on this sum at the rate of eight per cent per annum from July 17, 1903, and thus compounding this interest oftener than once a year. Not only so but said Bank computed the interest on this sum of $72,891.30 and computed the interest on this interest in advance for one month at the rate of eight per cent per annum and took from Plaintiff Holden the said renewal note for $1,586.85 which represented this interest and upon which it charged said Holden interest at the rate of eight per cent per annum and in this way the interest was compounded oftener than once a year, contrary to said laws and statutes of Missouri. Plaintiffs say that under the National Banking laws all of the interest carried with and agreed to be paid on said renewal notes was and is forfeited, and there was due the said Bank only the net sum originally loaned less the payments made thereon by said Holden.

10 Plaintiffs say that Plaintiff Holden paid to said defendant Bank on his said indebtedness the sum of $1,112.60 from said June 17, 1903, to March 8, 1904, at which later date said renewal notes were taken up by said Holden and a new note given by him in renewal thereof for the sum of $77,873.90, and plaintiffs charge that in exacting and taking from said Holden the said renewal note the said Bank was guilty of knowingly taking, receiving, reserving and charging a rate of interest greater than was allowed by the laws of Missouri; that said last mentioned note was given for the balance of the principal debt of $59,927.59 due by said Holden and $17,946.31 of usurious interest taken and charged as aforesaid by said Bank against said Holden; that said item of interest which entered into said note represented the corrupt and usurious interest carried by and agreed to be paid on the said notes of which it was a renewal; and that the interest charged into and which formed a part of said note was calculated at a greater rate than was allowed by the laws of Missouri and which was compounded oftener than once a year, whereby, all of the interest carried with and agreed to be paid on said last mentioned note is and was forfeited and the said Bank is not entitled to receive any interest thereon, nor on the renewals thereof.

Plaintiffs say that from said March 8, 1904 to May 12, 1904, the said plaintiff Holden paid to said bank the further sum of $1,015.85 on his said indebtedness leaving the amount due the bank

11 thereon the sum of $58,911.74 of principal, and the only amount due thereon, all interest thereon having been forfeited by reason of the aforesaid corrupt usurious charges. Plaintiffs state that said bank at the time of taking said last mentioned note claimed to hold the said note and mortgage of the Holden Land and Live Stock Company for $82,000.00 as collateral security for the payment thereof, together with other collaterals deposited with it by the said Howard M. Holden. Plaintiffs say that on account of said usurious transactions and on account of the usury contained in said last mentioned note for $77,873.90 and contained in the notes of which it was a renewal said defendant bank could

acquire and did acquire no title whatever to the said $82,000.00 note of the Holden Land and Live Stock Company as collateral; that under the laws of Missouri, Section 3710 of the Revised Statutes of Missouri of 1899 it is and was provided that the exaction of usurious interest "shall render any mortgage or pledge of personal property or any lien whatsoever thereon given to secure such indebtedness invalid and illegal."

Plaintiffs state that the defendant bank well knowing the premises and well knowing that it had no title to the said collateral note of $82,000.00 of the Holden Land and Live Stock Company on account of the usury in the notes for which it was attempted to be pledged to secure, and well knowing that by its corrupt and usurious charges it was not entitled to recover from said Holden any interest on the money which it had loaned him, and for the purpose of
12 covering up and concealing its said usurious transactions and for the purpose of acquiring title to the said real estate of the Holden Land and Live Stock Company without paying any consideration therefor attempted to procure from said Holden Land and Live Stock Company a deed to all of said real estate to secure its said usurious debt, which said scheme and plan was attempted to be carried out by said defendant Bank as hereinafter set forth.

Plaintiffs say that on account of the great and unusual flood which swept over this country in May, 1903, and flooded and inundated the Kaw Valley in which most of said lands were situated, nearly the entire crops on said lands were destroyed and very little income could be realized therefrom and said lands were for a time rendered unsalable and it became impossible for said Holden to meet his obligation to said Bank and pay said notes and he thereby became greatly embarrassed financially; that notwithstanding said lands and other collaterals which said Bank claimed to hold were of very great value, still it seemed to said Holden to be impossible at that time to realize any money on said collaterals without very great sacrifice, and plaintiffs say that the officers, agents and employés of said Bank for the purpose of taking advantage of said Holden's necessities and embarrassed circumstances demanded an immediate payment of said note under threats of selling said collaterals under the power of sale contained in said note at a ruinous sacrifice to said Holden,
13 and ignored his earnest pleas for any further forbearance, claiming that they were not permitted under the National Banking laws to carry his indebtedness in its present form, and, the said Holden, being urged thereto by his necessities, finally consented to change the form of his indebtedness to said Bank, and on the 12th day of May, 1904, the said Bank computed the said indebtedness of said Holden on account of said note, together with a note of six thousand, two hundred fifty-three dollars and thirty cents ($6,253.30), given for money advanced for interest and taxes on said prior mortgage, to be the sum of eighty-three thousand, six hundred, seventy-five dollars and thirty-two cents ($83,675.32); and that on that day required said Holden to enter into a pretended contract with the defendant, Inter-State Trading Company, which Company was organized by the officers and employés of said Bank for its own

purposes and as simply a device and form for carrying the securities of said Bank, the said Inter-State Trading Company being organized with a nominal capital only of two thousand dollars ($2,000.00) and without any funds or assets of its own, which said pretended contract provided, among other things, that:

Said Holden had caused to be sold, transferred and conveyed to said Inter-State Trading Company by the Holden Land and Live Stock Company the following described real estate, viz:

All of Section One (1) except that part of the west half
14 thereof lying north of the Union Pacific railroad right-of-way; all of Section Twelve (12); all of Section Thirteen (13) north of the Kansas River; Lots Six (6) and Seven (7) being all of the northeast quarter of Section Fourteen (14) lying south of the Kansas River; all of the North half of the southeast quarter of Section Fourteen (14) lying north of the Chicago, Rock Island and Pacific Railroad right-of-way, all in Township Eleven (11) Range Thirteen (13). Also, the east half of the southwest quarter and the southeast quarter of Section Twelve (12), and the southeast quarter of Section Thirty-six (36), all in Township Ten (10), of Range Thirteen (13); all of Section Thirty (30); all of Section Thirty-one (31), and the south half of Section Thirty-two (32) all in Township Ten (10) of Range Fourteen (14); also the west half of the northeast quarter, the northeast quarter of the southwest quarter, and the northwest quarter of Section Five (5); all of Section Six (6), except a tract of about three acres commencing at a stake fifty feet north of the Kansas (Union) Pacific Railroad on the line between Ranges 13 and 14; running thence south 71 degrees east, parallel with said railroad, 337 feet to a stake; thence south, 76 degrees, one minute and fifty seconds east, 150 feet to a stake 64 feet north of said railroad; thence south 74 degrees, east, 980 feet to a stake 69 feet north of said railroad; thence south 69 degrees east, to a stake 50 feet north of said railroad; thence south to the center of said railroad track;
15 thence north 71 degrees west to said range line; thence north 50 feet to the place of beginning; the west half and all of the east half lying north of the Union Pacific Railroad of Section Seven (7), and the southwest quarter of Section Eighteen (18), all in Township Eleven (11) of Range Fourteen (14), all in Shawnee County, Kansas, containing 4,942.80 acres more or less, subject to the rights-of-way of the Union Pacific Railroad Company and the Chicago, Rock Island and Pacific Railroad Company, now crossing said land; and also subject to a mortgage to the Mutual Benefit Life Insurance Company, dated June 6, 1901, and filed for record, June 7, 1901, and recorded in Volume 276 of Book 473, in the office of the register of deeds of said Shawnee County, Kansas; said lands being the property of the Holden Land and Live Stock Company. And said Holden also had caused to be conveyed to said Inter-State Trading Company by one W. H. Winants, who held the legal title to said land in trust for the said Howard M. Holden, all that part of the northeast quarter of Section Twenty-six (26), and all that part of the northwest quarter of Section Twenty-five (25), in Township Forty-nine (49), Range Thirty-three (33), lying south

and east of the Big Blue River, excepting the East Sixty acres of said land in Section Twenty-five (25), which — heretofore conveyed to one Thomas Reilly; also, the following described portions of said Sections Twenty-five (25) and Twenty-six (26), to-wit: Beginning at the northeast corner of the northwest quarter of the south-
16 west quarter of Section Twenty-five (25) aforesaid, thence south with the half quarter section line 558.3 feet; thence west 2029½ feet more or less, to a point on the bank of the Big Blue River in said Section 26; thence north eight degrees and forty-five minutes, west and along the bank of the Big Blue River, 564 feet, more or less, to a point where the half section line of said Section 26 intersects the bank of the Big Blue River, thence east along the half section line of said Sections 26 and 25 to the point of beginning, all situated in Jackson County, Missouri, subject to the right-of-way of the Kansas City Suburban Belt Railway Company, and of any legally existing roadways through said premises.

That each of the foregoing conveyances of said real estate to the said Inter-State Trading Company was made in pursuance of a certain agreement entered into on the 12th day of May, 1904, by and between the said Inter-State Trading Company and the said Howard M. Holden, one of the plaintiffs herein, and a copy of which agreement is hereto attached, marked "Exhibit A" and made a part of this amended petition.

That among other things it is provided in said agreement that in consideration of said conveyances the said Inter-State Trading Company had that day paid to the National Bank of Commerce of Kansas City, Missouri, a certain note executed by Howard M. Holden on the 8th day of March, 1903, for the sum of $77,873.90, payable to the National Bank of Commerce of Kansas City, thirty
17 days after date, and the amount of $6,253.30, this day advanced the Mutual Benefit Life Insurance Company for interest and taxes, and as a further consideration therefor the said Inter-State Trading Company agreed that said Holden should have the right to sell, as agent of said Inter-State Trading Company, and at any time prior to the 9th day of November, 1904, all of the above described personal and real property, or so much thereof as shall not theretofore have been disposed of by the said Inter-State Trading Company as hereinafter provided, at a minimum price, to be ascertained as hereinafter provided, to be paid in cash to said Inter-State Trading Company; and if said Holden should, on or before the 9th day of November, 1904, make a sale of said property to a purchaser, who shall thereupon pay to said Inter-State Trading Company, in cash, a sum not less than said minimum price, then said Company should, upon payment of said purchase price, convey the said property to such purchaser, and thereupon said Holden should receive, as full compensation for all services rendered and expenses incurred by him in making a sale of said property, whatever sum may be paid for said property by the purchaser thereof in excess of the said minimum sum; but in the event said Holden should make a sale of said property at said minimum price, he shall not be paid

any sum whatsoever for his services or expenses incurred in making said sale.

18 It was also provided in said contract that the minimum price at which said Holden may, at any time prior to the 9th day of November, 1904, sell the property hereinbefore described, or such portion thereof, as shall not then have been sold by said Inter-State Trading Company, shall be ascertained by adding to the sum of $83,675.32 (said amount being represented by the aforesaid note of $77,873.90 on which the sum of $77,422.02 is now due and by a note dated May 12th, 1904, executed by Howard M. Holden, payable on demand, for the sum of $6,253.50, which has been given for the said advance to the Mutual Benefit Life Insurance Company) interest thereon from this date at the rate of eight per cent per annum, and also by adding thereto any expense that may be incurred by said Inter-State Trading Company in caring for, handling, improving or selling the said property, or any portion thereof, and by deducting from the aggregate amount thus found the aggregate sum that may then have been realized by said Inter-State Trading Company from the sale or sales of any portion of said property, and from the leasing thereof (the sum realized from leasing to be ascertained by calculating the pro rata amount up to the date of said — by said Holden), and from the proceeds of any crops sold by said Inter-State Trading Company.

And it is further agreed by and between the parties to said contract that if said Holden shall not have effected a sale of said property on or before the said 9th day of November, 1904, strictly in

19 accordance with the terms and conditions above set forth, then the right of said Holden to sell said property should terminate, and he should not thereafter have any right to make a sale of said property under the terms of said contract, and shall have no claim upon said Inter-State Trading Company for any expense incurred, or for any work or labor done by him in efforts to make a sale of said property.

Plaintiffs say it is not true as expressed in said contract that in consideration of said conveyance, the said Inter-State Trading Company, on the date of said contract, paid to the National Bank of Commerce the note executed by said Holden to the said Bank for $77,873.90, dated March 8, 1904, and the sum of $6,253.30 on that day advanced to the Mutual Benefit Life Insurance Company as interest and taxes nor did the said Inter-State Trading Company on that day, nor did it at any other time, pay to said Bank any sum of money whatsoever on the said indebtedness of said Holden to said Bank, as will fully appear by the subsequent contract hereinafter set forth, nor did said Inter-State Trading Company pay to the plaintiffs, or either of them, any consideration whatsoever for the conveyances mentioned in said contract nor was it ever intended by either party that any consideration should be paid. Plaintiffs say and charge that the only title acquired by said Inter-State Trading Company to the property mentioned in said contract, if any at all, was the bare legal title thereto, to be held in trust to secure the payment of the indebtedness of said Holden to said Bank.

Plaintiffs further say that in an attempt to carry out the provisions of said pretended contract, the said Howard M. Holden, acting as the president of the said Holden Land and Live Stock Company, caused to be executed, acknowledged and delivered to the said Inter-State Trading Company on the said 12th day of May, 1904, a certain pretended warranty deed of that date, whereby he pretended to convey to said Inter-State Trading Company the lands of the said Holden Land and Live Stock Company in said contract described, which said pretended deed was by the defendants filed for record in the office of the Register of Deeds of Shawnee County, Kansas, and is duly recorded in Book 304, page 442.

Plaintiffs say that they are informed and believe that said pretended warranty deed is wholly invalid as a conveyance of said lands and for any purpose whatsoever, and in any event could have no greater force and effect than clothing the said Inter-State Trading Company with the naked legal title to said lands to be held in trust by it for the payment of any sum of money which was at that time due by said Howard M. Holden on the balance of his said indebtedness to said Bank hereinbefore described, for the payment of which said Bank claimed to hold said note of $82,000.00 as collateral, and to secure the balance, if any, then due on said note; plaintiffs say that the lands described in said pretended deed constituted the entire assets of said corporation, and there was no vote of the stockholders taken to authorize said pretended conveyance of all the assets of said corporation; that the lands attempted to be conveyed by said pretended deed were of very great value as assets of said corporation and worth vastly more than any balance due on the said indebtedness of said Holden to said Bank or on said mortgage of $82,000.00 and on any prior mortgage, the amounts of which had been greatly reduced by the proceeds from the sales of lands covered thereby; that no price or value whatever was fixed on the equity of redemption of the Holden Land and Live Stock Company in said lands at the time of said pretended conveyance and no consideration whatever was agreed upon between the said Holden Land and Live Stock Company and the Inter-State Trading Company as a price for said lands, and no negotiations whatever was had between said corporations attempting to fix any value on said lands; that no accounting was had between said parties to ascertain what, if anything, remained due and unpaid on said $82,000.00 mortgage held as collateral as aforesaid; that no consideration passed from the said Inter-State Trading Company to said Holden Land and Live Stock Company in payment for said lands, and no sum of money nor any consideration whatsoever was paid to the said Holden Land and Live Stock Company for said lands; all of which was well known to the defendants at the time said pretended deed was executed and delivered; that the said $82,000.00 note claimed to be held by the Bank as collateral was not at the time returned to the plaintiffs and never has been returned to them nor to either of them and the mortgage securing the same remained in full force on the records of

said county and was claimed by said Bank to be a valid and subsisting lien on said lands until the year 1906.

Plaintiffs further say that the sole intention, agreement and understanding by and between all the parties to said pretended deed, was that it should only invest the title of said real estate in said Inter-State Trading Company in trust as security for the payment of any amount that might be due by said Holden to said Bank, and for which it claimed to hold said mortgage note of $82,000.00 as collateral, as is clearly shown by the terms of said contract hereinbefore set forth, and from all the facts and circumstances surrounding said transactions as above set forth; that the object, intent and purpose of said Bank was to conceal and cover up its said usurious transactions; and plaintiffs say that after said pretended deed was executed and delivered to said Inter-State Trading Company, the said Holden Land and Live Stock Company continued in possession of said lands, collecting the rents therefor, paying taxes thereon and making valuable and lasting improvements thereon; that since the making of said pretended deed the said Holden Land and Live Stock Company has caused a large portion of said lands to be sold, with the consent of the mortgagees, and that the proceeds arising from such sales in 1906 and 1907, amounting to over $100,000.00, have been applied to the payment of the indebtedness of said Holden to said Bank and to the payment of said prior mortgage,
23 and no part of the same has been claimed by nor paid to said Inter-State Trading Company.

Plaintiffs further state that no consideration whatsoever was paid by the said Inter-State Trading Company to said Winants, nor to said Holden, nor to any one else for said Jackson County lands; that by virtue of the agreements, intentions and understanding of all parties to said transaction the said Inter-State Trading Company took the bare legal title to said land in trust to secure the said Bank in the payment of the said indebtedness represented by the renewal notes of said $80,000.00 note; that said Holden was then in possession of said lands and continued in such possession collecting rents and paying taxes thereon.

Plaintiffs further state that after the execution of the contract of May 12, 1904, hereinbefore set forth, and after the execution and delivery of the deeds from the Holden Land and Live Stock Company to the Inter-State Trading Company, and from W. H. Winants to said Inter-State Trading Company on the 12th day of May, 1904, the defendants well knowing the premises, and well knowing that said contract and the conveyances made thereunder, were invalid and ineffectual to carry out the purposes of said defendant Bank to acquire said real estate either as security for its said debt or otherwise and well knowing that said contract did not express the real purpose and agreement of the parties thereto which was that said conveyance of said land was only intended to secure the indebtedness of said Holden to said
24 Bank, represented by the said note of March 8, 1904, and still contriving and intending as aforesaid to establish for said Bank a lien on said real estate to secure the payment of its

usurious claim against said Holden represented in the said notes and, more effectually to cover up and conceal its said corrupt and usurious transaction with said Holden, abandoned, annulled and wholly disregarded the terms of said contract of May 12, 1904, and on the 14th day of May, 1904, required plaintiffs to enter into a further contract and agreement of that date, wherein it was provided that the National Bank of Commerce had deposited with James A. Patton the two notes made by Howard M. Holden to said Bank, one of which was dated March 8, 1904, and is for the sum of $77,873.90, due thirty days after date, with interest from maturity at the rate of eight per cent per annum. There have been some payments made on said note. Said note is secured by collateral, a list of which is endorsed on the back thereof; and that

Said Bank had also deposited with said Patton said collateral, which was hypothecated to secure the payment of said note; that the other one of said notes is dated May 12, 1904, and is for the sum of $6,253.30, payable on demand, bearing interest from date at the rate of eight per cent per annum.

It was also provided in said subsequent contract that the Inter-State Trading Company, a corporation, had deposited with said Patton a note for the sum of $83,675.32, with eight per cent
25 interest from date, payable on the 9th day of November, 1904, to the National Bank of Commerce of Kansas City, Missouri, and that Howard M. Holden had deposited with said Patton a bill of sale transferring to said Inter-State Trading Company bonds and shares of stock of the Brush Creek Coal Mining Company, heretofore deposited with the said National Bank of Commerce of Kansas City, Missouri, to secure the note above mentioned and a description of which is on the back of said note. Said bill of sale also covered the notes made by one Hartzell, one Anderson, and one James, which were also heretofore hypothecated with said Bank as collateral and which are described on the back of said note dated March 8, 1904.

That said Holden had caused to be deposited with said Patton a deed executed by the Holden Land and Live Stock Company, conveying to said Inter-State Trading Company 4,942.80 acres of land in Shawnee County, Kansas, and also a deed made by W. H. Winants and wife, conveying to said Inter-State Trading Company certain real estate located in Jackson County, Missouri; that it was further agreed by and between said National Bank of Commerce, the said Inter-State Trading Company, the said Howard M. Holden and the said Holden Land and Live Stock Company, by the terms of said contract, that if the said notes executed by the said Howard M. Holden to said National Bank of Commerce should be paid in full, both principal and interest, on or before the 9th day of July, 1904,
then the said Patton should surrender to the said Howard
26 M. Holden the said two notes and also all the collateral which was theretofore hypothecated with the said National Bank of Commerce to secure the payment of said notes or either of them; and that he should also deliver to said Holden said deed made by said Holden Land and Live Stock Company to said Inter-State

Trading Company, and said deed made by said Winants to said Inter-State Trading Company; that he should also deliver to the Inter-State Trading Company said note for $83,675.32.

It is also provided by said contract that if said Holden, or some one for him, should not have paid in full said two notes made by him to said National Bank of Commerce on or before the 9th day of July, 1904, then the said Patton should immediately deliver to said Inter-State Trading Company said deeds and bill of sale above mentioned, and should deliver to said National Bank of Commerce said note of said Trading Company; and should also surrender to said Holden said two notes made by him to said National Bank of Commerce, and should cancel the note for $82,000.00 dated July 1, 1901, made by the Holden Land and Live Stock Company to Howard M. Holden, which said note was theretofore hypothecated with said National Bank of Commerce to secure the payment of said note dated March 8, 1904, and that he should acknowledge satisfaction of the mortgage given by said Holden Land and Live Stock Company to secure the payment of said $82,000.00 note.

It is also provided by said subsequent contract that said
27 papers and documents above described were deposited with and to be held by said Patton in escrow, and that if said Holden should not pay said two notes made by him at the National Bank of Commerce on or before the 9th day of July, 1904, then said papers and documents were to be delivered to the parties respectively entitled thereto as provided in said contract, and that they would thereupon have the same force and effect as if delivered by the parties executing the same to the parties thereto entitled.

Plaintiffs further state that the time for the payment of said notes was extended from time to time by written memoranda on said contract until the 11th day of October, 1904.

A copy of said subsequent contract, together with said extensions thereon, is hereto attached, marked "Exhibit B" and made a part of this petition.

Plaintiffs state that there was no additional consideration for said subsequent contract but that its purpose was to show the understanding and agreement of the parties, as hereinbefore set forth, that the said conveyance of said real estate was only intended to secure the payment of said notes of said Holden to said Bank and that said notes had not been paid and extinguished by said conveyances and were not intended to be at that time paid and extinguished by said conveyances and to show that the time of the payment of said notes had been shortened to said July 9th, 1904; that both of said contracts were prepared by the attorneys of said Bank and constituted
a part of the same transaction under which said conveyances
28 of real estate were made; that the agreement, understanding and intention of all parties to the said contracts and conveyances as hereinbefore set forth was simply to pledge said real estate to said Bank and to said Inter-State Trading Company as representing said Bank, for the payment of any indebtedness of said Holden to said Bank represented by said notes, as is manifest from said contract of defeasance of May 14, 1904, and from all the facts

and circumstances surrounding said transactions and from the prior and subsequent conduct of all the parties to said transaction as hereinbefore set forth.

Plaintiffs say that on account of the charges of usury as aforesaid contained in said notes the aforesaid pledge is and was invalid and the said Bank acquired no title to said collateral security; that the only legal title, if any, acquired by said Inter-State Trading Company by said deeds, was simply an estate in trust to secure the said indebtedness of said Holden.

Plaintiffs say that the said James A. Patton mentioned in said contract of May 14, 1904, was an officer and employee of said Bank and represented said Bank in said transaction; that said Patton without the knowledge or consent of plaintiffs, and in violation of the trust reposed in him, caused said deeds to be placed upon record shortly after the time of the payment of the said notes under the terms of the contract had expired; that any and all provisions in said contracts and deeds which in any way attempted to extinguish and cut off plaintiff's equity of redemption in said lands upon the failure of the said Holden to pay said indebtedness promptly were contrary to law, without consideration, ineffectual and void for that purpose; that under the laws of the State of Kansas the plaintiffs had the right and still have the right to redeem said land by the payment of said indebtedness.

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Plaintiffs say that they have long since paid to said Bank sums of money, as hereinbefore set forth, largely in excess of the amount due by said Holden to said Bank on account of the said $80,000.00 note represented in said contracts by said renewal note of March 8, 1904; that all the indebtedness due by said Holden to said Bank and for which said land was pledged as security as aforesaid have been fully paid; that said Bank now holds the said note and mortgage of $90,000.00 given to the Mutual Benefit Life Insurance Company hereinbefore described and upon which the plaintiffs have made large payments; that said note should be credited with all sums of money received by said Bank from plaintiffs in excess of the amount necessary to pay off the said indebtedness of said Holden to said Bank as above described.

Plaintiffs say that they are not informed as to the full amount received by said Bank from the collateral security which it claimed to hold, and from other sources from plaintiffs and from the property of plaintiffs; that they have often requested and urged the officers of said Bank to render a statement and account of such indebtedness, and although such officers repeatedly promised and agreed to and with said plaintiffs to render an account and statement of such indebtedness, during the year 1906 and prior thereto and since that time, said Bank has failed and neglected and now neglects, fails and refuses to account to the plaintiffs or either of them for the money received by said Bank on account of said notes and mortgages. Plaintiffs say and charge that said Bank has, out of the sales of the property of the Holden Land and Live Stock Company and from other sources, collected and received an amount in excess of any balance due on said indebtedness of said

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Holden to said Bank, and that the lands of said Holden Land and Live Stock Company described in said pretended warranty deed should be released and discharged from all liens on account of such mortgage.

Wherefore, the premises considered, the plaintiffs pray for the following relief:

First. Plaintiffs pray that the said pretended warranty deed, dated May 12, 1904, and recorded October 12, 1904, in the office of the Register of Deeds of Shawnee County, Kansas, in Book 304, page 442, be cancelled, annulled, set aside and held for naught, and that the title to the lands therein described, such as may not have been heretofore sold and conveyed to other parties, be divested out of said defendants, and invested in the plaintiff, Holden Land and Live Stock Company.

Second. Plaintiffs pray that defendants be compelled to render an account to the plaintiffs, Holden Land and Live Stock
31 Company and Howard M. Holden of all money received by them or either of them from the sale of any of said lands, and for the rents and profits received from any and every one from said lands, and for all money received from said collateral and from any other source which should be applied to the extinguishment of said indebtedness, and that an accounting be had between said defendants and said Holden Land and Live Stock Company and the said Howard M. Holden, to ascertain what, if anything, is now due on the indebtedness of said Holden to said Bank heretofore secured by said mortgage note of $82,000.00 and that upon such accounting, if it be ascertained that said indebtedness has been paid, the court order, adjudge and decree that said mortgage be cancelled and that said real estate be discharged of all liens on account thereof, and if on such accounting it be found that there remains any portion of said indebtedness due and unpaid, that said Holden Land and Live Stock Company and the said Howard M. Holden be given the ordinary reasonable time in which to pay said balance, and that in default of such payment said mortgage be foreclosed according to the laws of the State of Kansas.

Third. Plaintiffs pray that on such accounting the defendant Bank be adjudged to have forfeited all interest which was carried with and agreed to be paid on said renewal notes of said Holden to said Bank, under the National Banking Laws of the United States, and that said Holden be only charged with the principal sum
32 borrowed from said Bank without any interest, and that if it be found on such accounting that said Bank has received more than said principal on account of said indebtedness that the said Bank be compelled to credit the excess thus found on the said Mutual Benefit Life Insurance Company note held by it as of the date of the payments of such excess.

Fourth. Plaintiffs further pray that if the court should find and adjudge that any or all of the conveyances made to the Inter-State Trading Company are valid for any purpose, that the court adjudge and decree that such conveyances are only valid for the purpose of creating a trust estate in said Inter-State Trading Company and that

it holds the property conveyed in trust to secure the indebtedness of plaintiffs to said Bank, and that plaintiffs, respectively, are entitled to an equity of redemption in said premises, and plaintiffs pray that said Inter-State Trading Company be enjoined and restrained from disposing of the property described in said conveyances to it.

Fifth. Plaintiffs further pray that if the court should determine that they are mistaken in any of the relief prayed for, that the court on final hearing hereof may grant to plaintiffs and to each of them such other and further relief, both in law and in equity as may seem to the court just, equitable and proper upon the final hearing hereof.

33 *Answer to Second Amended Petition.*

Comes now the said defendants and for their answer to the second amended petition filed by the plaintiffs herein, say and aver:

1st. They deny each and every allegation in said 2nd amended petition contained except such as are hereinafter specifically admitted.

2nd. Further answering, the said defendants say that on the 1st day of July, 1901, the said defendant, The National Bank of Commerce of Kansas City, Missouri, loaned to said Howard M. Holden, one of the above mentioned plaintiffs, the sum of eighty thousand dollars ($80,000.00), and as evidence of said indebtedness the said Howard M. Holden made, executed, and delivered to said bank his promissory note for said sum, payable one year after date, and in order to secure the payment of said note the said Howard M. Holden delivered to said bank the following collateral security, to-wit:

A note of eighty-two thousand dollars ($82,000.00) dated July 1st, 1901, made by said Holden Land and Live Stock Company, payable one year after date to the order of Howard H. Holden, which said note was endorsed by said Holden and was secured by a mortgage upon certain real estate located in Shawnee County, Kansas, as alleged in said amended petition herein filed.

Certificate number seven (7) for five hundred forty-eight (548) shares, and certificate number eighteen (18) for one hun-
34 dred thirty-two (132) shares, and certificate number two (2) for one (1) share, and certificate number nineteen (19) for sixty-seven (67) shares, all of which said shares are for stock of the Brush Creek Coal and Mining Company, total, seven hundred and forty-eight (748) shares.

One hundred and thirty-eight bonds of the Brush Creek Coal and Mining Company, numbered one (1) to sixty-eight (68) inclusive, and seventy-one (71) to one hundred and forty (140) inclusive, 138 bonds of five hundred dollars ($500.00) each, amounting to sixty-nine thousand dollars ($69,000.00).

Notes of L. P. Hartzell, one for five hundred dollars ($500.00) and three for one thousand dollars ($1,000.00) each, all dated April 1st, 1903, all secured mortgage.

Notes of Jones Anderson, four for four hundred dollars ($400) all dated April 1st, 1903, secured by mortgage.

Two notes of John E. James for one thousand and twenty-five dollars ($1,025.00) each dated April 1st, 1903, secured by mortgage.

And also to further secure the payment of said money said Howard M. Holden pledged to said bank the real estate described in said amended petition as located in Jackson County, Missouri.

The said defendants further allege that at the time of the transaction above set forth the said real estate located in Shawnee County, Kansas, was mortgaged to The Mutual Benefit Life Insurance
35 Company for the sum of ninety thousand dollars ($90,000.00), which said mortgage was a first lien on said real estate; and the said Jackson County, Missouri, land described in said amended petition, was subject to a mortgage of — which was a prior lien to the lien of said bank.

The said defendants further allege that the said Howard M. Holden failed to pay his note to said bank when the same became due, but the same was renewed from time to time, and payments made by said Holden on the interest and principal of said debt until the 8th day of March, 1904, when a full and complete settlement was had between the said bank and said Howard M. Holden, at which time it was ascertained and agreed to by said parties that the said Holden was still indebted to said bank, on account of said loan and interest on the same, in the sum of seventy-seven thousand, eight hundred seventy-three and 90-100 dollars ($77,873.90), for which sum the said Holden executed a renewal note to said bank payable thirty (30) days after date, with interest at the rate of eight (8) per cent per annum after maturity.

The said defendants further allege that said Holden failed to pay said last mentioned renewal note at the time the same became due and payable according to its term, and said defendants further say that the said plaintiffs, the said Holden Land and Live Stock Company and the said Howard M. Holden, failed and neglected to pay the taxes on the real estate located in Shawnee County,
36 Kansas, and that the Mutual Benefit Life Insurance Company, which held the first mortgage on said lands, was compelled to pay the sum in order to protect its lien, and on the 12th day of May, 1904, was about to commence foreclosure proceedings on said mortgage on account of the default in the conditions thereof, occasioned by the failure of the plaintiffs to pay the taxes and assessments on said lands at the time the same became due and payable. The defendants further allege that in order to protect its lien on said Shawnee County, Kansas, lands, the said National Bank of Commerce of Kansas City, Missouri, was obliged to, and did, advance and pay the said Mutual Benefit Life Insurance Company the amount of taxes, penalty and interest so, as aforesaid, paid by said Insurance Company, to-wit: the sum of six thousand two hundred fifty-three and 30-100 dollars ($6,253.30), for which sum of money advanced by it the said bank took from said plaintiffs their note payable on demand, for the sum of six thousand two hundred fifty-three and 30-100 dollars ($6,253.30), for the payment of which the said plaintiffs, at the time of the execution of said note, also pledged to said

bank all of the security theretofore held by said bank to secure the payment of said renewal note of seventy-seven thousand eight hundred seventy-three and 90-100 dollars ($77,873.90).

The said defendants further allege that on account of the failure of said Holden to pay said renewal note of seventy-seven
37 thousand eight hundred seventy-three and 90-100 dollars ($77,873.90) at the time the same became due, and on account of the failure of said plaintiffs to pay the taxes and assessments on the Shawnee County, Kansas, land, as aforesaid, the said bank, on the 12th day of May, 1904, was about to commence proceedings to foreclose its liens upon all of the property pledged by said Holden to secure the payment thereof, but that on said day, the said Howard M. Holden and the said Holden Land and Live Stock Company, in order to avoid the expense of legal proceedings to foreclose said liens, and in order to protect said plaintiffs against liability for any deficiency that might arise because of the possible failure of said security to yield a sufficient amount at judicial sale to pay the full amount of the debt, and interest, owing by said Holden to said bank, proposed to sell to said bank all of the security in full payment and discharge of the indebtedness of said Holden to said bank, which said proposition the said bank then and there accepted with the modification that the transaction should take the form of a sale of said securities to the Inter-State Trading Company for the total amount of the indebtedness of said Holden to said bank and the execution of said Inter-State Trading Company to said bank of a note for the full amount of said indebtedness. The said defendants further allege that the said plaintiffs, on the said 12th day of May, 1904, accepted the proposition of said bank, and the Inter-State Trading Company agreeing thereto, entered into a formal written agreement embodying all the terms and conditions of said
38 contract, a copy of which said written agreement is hereto attached, marked "Exhibit A" and made a part hereof. The said defendants further allege that at the time of the execution of said agreement, marked "Exhibit A," the said bank agreed to accept the note of the said Inter-State Trading Company for the sum of eighty-three thousand six hundred seventy-five and 32-100 dollars ($83,675.32) in full payment of the indebtedness of said Holden to said bank.

The said defendants further allege that thereafter, to-wit, on the 14th day of May, 1904, and before the delivery of the conveyances and transfers mentioned in said "Exhibit A," the said Inter-State Trading Company, the said Howard M. Holden, the said Holden Land and Live Stock Company, and the said National Bank of Commerce of Kansas City, Missouri, entered into an agreement postponing the time when said conveyances and transfers should take effect, which said agreement was fully reduced to writing and signed by the parties thereto, a copy of which said agreement is hereto attached, marked "Exhibit B" and made a part of this answer. The said defendants further allege that the time for the performance of the conditions of said last mentioned contract was extended from time to time, to-wit; from the 9th day of July, 1904, to the 1st day

of September, 1904, by certain endorsement on said agreement duly executed by the parties thereto, and afterwards was extended from September 1st, 1904, to October 1st, 1904, and thereafter was
39 duly extended from October 1st, 1904, to October 11th, 1904, all of which extensions of time was evidenced by written endorsements on said written agreement and signed by the parties thereto, a copy of which endorsements have been fully set forth as a part of "Exhibit B," hereto attached.

The said defendants further allege that afterwards, and on or about the 15th day of October, 1904, the said plaintiffs having wholly failed to pay the various sums of money mentioned in said agreement, marked "Exhibit B," the conveyances and transfers mentioned in said "Exhibit B" were duly delivered according to the terms of said agreement to the parties entitled thereto and became, and were, from said time in full force and effect. The defendants further allege that the said plaintiffs in good faith carried out their part of said agreement, and thereafter duly delivered up and turned over possession of all the property so, as aforesaid, conveyed and transferred according to the terms of said written instruments marked "Exhibit A" and "Exhibit B." The defendants further allege that a copy of the bill of sale referred to in said written agreements is hereto attached, marked "Exhibit C" and made a part hereof.

The said defendants further allege that thereafter, to-wit, on the 16th day of February, 1905, the said National Bank of Commerce of Kansas City, Missouri, at that time the owner of the lands mentioned and described in said amended petition as located in Shawnee County, Kansas, leased to the said Howard M. Holden all
40 of said lands for the term of one year, according to the terms and conditions as a written agreement of lease, signed by said Howard M. Holden and the said bank, a copy of which said written agreement of lease is hereto attached, marked "Exhibit D," and made a part hereof. The said defendants further allege that the said Howard M. Holden, continued *on* possession of said Shawnee County Kansas, lands under the terms and conditions of said lease, until the present time, and has not had control or possession in any other capacity whatever.

The said defendants further allege that since the execution of said lease certain of said leased premises have been sold by said Howard M. Holden, acting as agent for the owner of said lands, and receiving a commission for the sale of the same in full compensation for his services in effecting such sale. The said defendants further allege that at the time the said bank received said note and mortgage of eighty-two thousand dollars ($82,000.00) made and executed by the said Holden Land and Live Stock Company to the said Howard M. Holden, the said bank received the same in good faith without any notice of any defenses that said Holden Land and Live Stock Company may have had to said note and mortgage as against said Howard M. Holden, and that the said bank, at the time it received said note and mortgage, advanced to the said Howard M. Holden, a large amount of money upon the faith of said security,

to-wit, the sum of eighty thousand dollars ($80,000.00).

41 And the said defendants further allege that the said Holden Land and Live Stock Company, being unable to pay said mortgage at the time of its maturity, and at the time of the maturity of the various extensions of time granted to said Howard M. Holden, executed and delivered its warranty deed to said land for the sole purpose of discharging and acquitting itself of the debt of eighty-two thousand dollars ($82,000.00) evidenced by said note and mortgage. The said defendants further allege that all of the agreements made between them, or either of them, and the said plaintiffs, or either of them, relative to the lands described in said second amended petition, and relative to the collateral deposited by said Howard M. Holden to secure the payment of his debt to said bank, were wholly and fully reduced to writing, and are evidenced by said written agreements, copies of which are hereto attached, marked "Exhibit A," "Exhibit B," "Exhibit C" and "Exhibit D," and that no other or different agreements have been entered into between any of said parties relative to said subject matter.

The said defendants further allege that since the delivery of said conveyances and transfers mentioned in said "Exhibit B," the said plaintiffs, nor either of them, have had any right, title, interest, estate, or claim upon any of the real estate or personal property mentioned in said agreements, except as acquired by said agreement of lease, but that on the contrary, the said defendants have been the absolute owners in fee simple of said property.

42 Therefore these defendants pray that they may go hence without day and that the costs of this suit may be adjudged against the plaintiffs.

WARD, HADLEY & NEEL AND
JOHN S. DEAN,
Attorneys for Defendants.

EXHIBIT "A."

(Copy.)

This agreement, Made and entered into this 12th day of May, 1904, by and between the Interstate Trading Company, a corporation, party of the first part, and Howard M. Holden of Jackson County, Missouri, party of the second part, Witnesseth:

1. The said second party has this day sold, transferred and conveyed to the said first party the following described personal property, viz: Seven Hundred and Forty-eight (748) shares of the Capital stock of the Brush Creek Coal and Mining Company, of which 548 shares are evidenced by certificate No. 7, 132 shares by certificate No. 18, 1 share by certificate No. 2 and 67 shares by certificate No. 19; also One Hundred and Thirty-eight (138) bonds of the said Brush Creek Coal and Mining Company, said bonds being for the sum of $500.00 each, and numbered one to sixty-eight inclusive, (Sixty-eight bonds of $500.00 each) and numbers Seventy-

one to One Hundred & Forty (71-140) inclusive, Seventy
43 bonds of $500,00 each; also four notes made by one L. P. Hartzell, one being for the sum of Five Hundred Dollars ($500.00), and three being for the sum of One Thousand Dollars ($1,000.00) each, all of said notes being dated April 1st, 1903, and secured by mortgage; also four notes made by one James Anderson, being for the sum of Four Hundred Dollars ($400.00) each and all dated April 1st, 1903, and secured by mortgage; and also one note made by one John E. James, for the sum of Ten Hundred and twenty-five Dollars ($1,025.00) dated April 1st, 1903, and secured by mortgage, by which said sale, transfer and conveyance the absolute title to said above described property is vested in said first party.

Said second party has also caused to be sold, transferred and conveyed to said first party, the following described real estate, viz: (here follows description of lands in Shawnee County, Kansas, appearing in said amended petition) all in Shawnee County, Kansas, containing 4942.80 acres, more or less, subject to the right-of-way of the Union Pacific Railroad Company and the Chicago, Rock Island and Pacific Railroad Company now crossing said land and also subject to a mortgage to the Mutual Benefit Life Insurance Company, dated June 6th, 1901, and filed for record June 7th, 1901, and recorded in Volume 276, of Book 473, in the office of the Register of Deeds of said Shawnee County, Kansas; and also (here follows description of land in Jackson County, Mo., appearing in
said amended petition) and also subject to a deed of trust to
44 J. C. Rosenburg, Trustee for Patrick Corrigan, dated June 5th, 1897, and recorded at page 637 of Book B. 629 in the office of the Recorder of Deeds of Jackson County, Missouri, at Kansas City, by which said conveyances the title to said above described real estate is vested absolutely in said first party, subject to the rights-of-way and mortgages above mentioned.

In consideration of said conveyances the said first party has this day paid to the National Bank of Commerce of Kansas City, Missouri, a certain note executed by Howard M. Holden on the 8th day of March, 1904, for the sum of $77,873.90, payable to the National Bank of Commerce of Kansas City, thirty days after date, and the amount of $6,253.30 this day advanced the Mutual Benefit Life Insurance Company as interest and taxes, and as a further consideration therefor the said first party agrees that said second party shall have the right to sell, as agent of said first party, at any time prior to the 9th day of November, 1904, all of the above described personal and real property, or so much thereof as shall not theretofore have been disposed of by said first party, as hereinafter provided, at a minimum price, to be ascertained as hereinafter provided, to be paid in cash to said first party; and if said second party shall, on or before said 9th day of November, 1904, make a sale of said property to a purchaser, who shall thereupon pay to said first party, in cash, a sum not less than said minimum price, then said first party shall, upon payment of said purchase price, convey the said property to

such purchaser, and thereupon said second party shall re-
45 ceive, as full compensation for all services rendered and expenses incurred by him in making a sale of said property, whatever sum may be paid for said property by the purchaser thereof in excess of said minimum sum; but in the event said second party shall make a sale of said property at said minimum price, he shall not be paid any sum whatever for his services or expenses incurred in making said sale.

2. It is further agreed by and between the parties hereto that nothing herein contained shall prevent the said party from selling, at such price as may be agreed upon between it and said second party, any portion of the property hereinbefore described, or from leasing, upon such terms as to it may seem best, all or any portion of said property, or from cultivating all or any portion of the real estate hereinabove described.

3. The minimum price at which said second party may, at any time prior to the 9th day of November, 1904, sell the property hereinabove described, or such portion thereof as shall not have been sold by said first party, shall be ascertained by adding to the sum of $83,675.32 (said amount being represented by the aforesaid note of $77,873.90 on which the sum of $77,422.02 is now due and by a note dated May 12th, 1904, executed by Howard M. Holden, payable on demand, for the sum of $6,253.30 which has been given for the said advance to the Mutual Benefit Life Insurance Company) interest thereon from this date at the rate of eight per cent per annum, and also by adding thereto any expense that may
46 be incurred by said party of the first part, in caring for, handling, improving or selling said property, or any portion thereof, and by deducting from the aggregate amount thus found, the aggregate sum that may then have been realized by said first party from the sale or sales of any portion of said property, and from the leasing thereof (the sum realized from leasing to be ascertained by calculating the pro rata amount up to the date of the sale by said second party) and from the proceeds of any crops sold by said first party.

4. And it is further agreed by and between the parties hereto that if said second party shall not have effected a sale of said property on or before the said 9th day of November, 1904, strictly in accordance with the terms and conditions above set forth, then the right of said second party to sell said property shall terminate and he shall not thereafter have any right to make a sale of said property under the terms of this contract, and shall have no claim upon said first party for any expense incurred, or for any work or labor done by him in efforts to make a sale of said property.

5. It is further agreed by and between the parties hereto that said second party shall not have the right, as agent of said first party, as herein provided, to bind said first party by any contract or agreement, verbal or written; but that the said first party hereby agrees and binds itself to faithfully carry out any contract for the sale of said property which said second party may make in strict accordance with the terms of this agreement.

47 In witness whereof, The said first party has caused this contract to be signed by its President and attested by its corporate seal, and the said second party has hereunto subscribed his name the day and year first above written.

[SEAL.] INTER STATE TRADING COMPANY,
(Signed) By H. WILSON PRATT, *President.*
(Signed) HOWARD M. HOLDEN.

EXHIBIT B.

(Copy.)

This memorandum witnesseth:

That the National Bank of Commerce of Kansas City, Missouri, has this day deposited with James A. Patton two notes, made by Howard M. Holden to said bank, one of which is dated Mar. 8th, 1904, and is for the sum of $77,873.90, due thirty days after date, with interest from maturity, at the rate of eight per cent per annum. There *had* have been some payments made on said note. Said note is secured by collateral, a list of which is endorsed on the back thereof. Said bank has also deposited with said Patton said collateral which was hypothecated to secure the payment of said note. The other one of said notes is dated May 12th, 1904, and is for the sum of $6,253.30 payable on demand, and bearing interest from date at the rate of eight per cent per annum.

48 The Inter-State Trading Company, a corporation, has deposited with said Patton a note for the sum of $83,675.32, with eight per cent interest from date, payable on the 9th day of November, 1904, to the National Bank of Commerce of Kansas City, Missouri.

Howard M. Holden of Jackson County, Missouri, has deposited with said Patton a bill of sale, transferring to said Inter-State Trading Company the bonds and shares of stock of the Brush Creek Coal and Mining Company, heretofore deposited with said National Bank of Commerce to secure the note above mentioned, and a description of which is on the back of said note, said bill of sale also covering the notes made by one Hartzell, one Anderson and one James, which were also heretofore hypothecated with said bank as collateral, and which are described on the back of the said note dated March 8th, 1904.

Said Holden *had* also caused to be deposited with said Patton a deed executed by the Holden Land and Live Stock Company, conveying to said Inter-State Trading Company 4,942.80 acres of land in Shawnee County, Kansas, and also a deed made by W. H. Winants and wife, of Jackson County, Missouri, conveying to said Inter-State Trading Company certain real estate located in Jackson County, Missouri, which was heretofore conveyed to said Winants by one Bayse.

It is hereby agreed by and between the said National Bank of Commerce, the said Inter-State Trading Company, the said Howard

M. Holden, and the said Holden Land and Live Stock Company, that if the said notes executed by said Howard M. Holden to
49 the said National Bank of Commerce shall be paid in full, both principal and interest, on or before the 9th day of July, 1904, then said Patton shall surrender to said Howard M. Holden said two notes, and also all of the collateral which was heretofore hypothecated with said National Bank of Commerce to secure the payment of said notes, or either of them; and shall also deliver to said Holden said deed made by said Land and Live Stock Company to said Inter-State Trading Company and said deed made by said Winants to said Inter-State Trading Company, and shall also deliver to said Inter-State Trading Company said note for $83,675.32.

If said Holden, or some one for him, shall not have paid, in full, said two notes made by him to said National Bank of Commerce, and hereinbefore described, on or before the 9th day of July, 1904, then said Patton shall immediately deliver to said Inter-State Trading Company said deeds and bill of sale above mentioned, and shall deliver to said National Bank of Commerce said note of said Trading Company and shall also surrender to said Holden said two notes made by him to said National Bank of Commerce, and shall cancel a note for $82,000.00, dated July 1st, 1901, made by the Holden Land and Live Stock Company to Howard M. Holden, and which note was not heretofore hypothecated with said National Bank of Commerce to secure the payment of said note dated March 8th, 1904, and shall acknowledge satisfaction of the mortgage given by said Holden Land and Live Stock Company to secure the payment of said $82,000.00 note.

50 Said papers and documents above described are deposited with and to be held by said Patton in escrow, and if said Holden should not pay said two notes made by him to the National Bank of Commerce on or before said 9th day of July, 1904, then said papers and documents are to be delivered to the parties respectively entitled thereto, as herein provided, and shall thereupon have the same force and effect as if delivered by the parties executing the same to the parties thereto entitled.

In witness whereof, The said National Bank of Commerce, the Inter-State Trading Company and the said Holden Land and Live Stock Company have each caused this instrument to be signed by its President, and the said Holden has hereunto subscribed his name this 14th day of May, 1904.

[SEAL.] THE NATIONAL BANK OF COMMERCE OF KANSAS CITY, MISSOURI.

(Signed) By W. H. WINANTS, *Vice-President.*

[Seal Inter-State Trading Company, Kansas City, Mo.]

INTER-STATE TRADING COMPANY,

(Signed) By H. WILSON PRATT, *President.*

HOLDEN LAND & LIVE STOCK COMPANY,

(Signed) By HOWARD M. HOLDEN, *President.*

(Signed) HOWARD M. HOLDEN.

By consent of the parties to this agreement the time during
51 which the papers mentioned in this agreement are to remain in possession of James A. Patton is hereby extended from July 9th, 1904, to Sept. 1st, 1904.

THE NATIONAL BANK OF COMMERCE
OF KANSAS CITY, MO.,
(Signed) By W. H. WINANTS, *Vice-President.*
INTER-STATE TRADING COMPANY,
(Signed) By H. WILSON PRATT, *President.*
HOLDEN LAND & LIVE STOCK CO.,
(Signed) By H. M. HOLDEN, *President.*
(Signed) H. M. HOLDEN.

(Written in pen and ink on back of last page.)

By consent of the parties to the enclosed agreement the time during which the papers mentioned in this agreement are to remain in the possession of James A. Patton is hereby extended to October 1st, 1904, from Sept. 1st, 1904.

THE NATIONAL BANK OF COMMERCE
OF KANSAS CITY, MO.,
(Signed) By W. H. WINANTS, *Vice-Pres.*
INTER-STATE TRADING COMPANY,
(Signed) By H. WILSON PRATT, *President.*
HOLDEN LAND & LIVE STOCK COMPANY,
(Signed) By H. M. HOLDEN, *Pres't.*
(Signed) H. M. HOLDEN.

By consent of the parties to the enclosed agreement the time during which the papers mentioned in this agreement are to remain in the possession of James A. Patton is hereby extended to October 11th, 1904, from Oct. 1, '04.

THE NATIONAL BANK OF COMMERCE
OF KANSAS CITY, MO.,
(Signed) By W. H. WINANTS, *Vice-Pres.*
INTER-STATE TRADING COMPANY,
(Signed) By H. WILSON PRATT, *President.*
HOLDEN LAND & LIVE STOCK COMPANY,
(Signed) By H. M. HOLDEN, *Pres't.*
(Signed) H. M. HOLDEN.

52 EXHIBIT C.

Bill of Sale.

Know all men by these presents, That I, Howard M. Holden of Kansas City, Mo., for and in consideration of the sum of Eighty-three Thousand Six Hundred & Seventy-five 32-100 Dollars to me in hand paid by The Inter-State Trading Company of Kansas City, Mo., the

receipt whereof is hereby acknowledged, by these presents do bargain and sell unto the said The Inter-State Trading Company all the following described bonds, Stocks and Notes—Viz: Certificate No. Seven (7) for Five Hundred Forty-Eight (548) shares, & Certificate No. Eighteen (18) for One Hundred Thirty-two (132) shares, & certificate No. Two (2) for One share, & Certificate No. 19 for Sixty-seven (67) shares of stock of the Brush Creek Coal & Mining Company, Total Seven Hundred Forty-eight (748) shares. Also 138 bonds of the Brush Creek Coal & Mining Company numbered one to sixty-eight inclusive and seventy-one to one hundred & forty inclusive—138 bonds of $500.00 each amounting to $69,000.00. Notes of L. P. Hartzell—one for $500.00 and three for $1,000.00 each all dated April 1st, 1903, all secured by mortgage. Also notes of Jones Anderson four for $400.00 each, all dated April 1st, 1903, secured by mortgage. Also two notes of John E. James for $1,025.00 each dated April 1st, 1903, secured by mortgage.

To have and to hold the same unto the said The Inter-State Trading Company and assigns forever; and that I will warrant
53 and *defendant* the title to the said goods and chattels hereby sold unto the said The Inter-State Trading Company and assigns, forever, against the lawful claims and demands *and* all persons whomsoever.

In witness whereof, The said Howard M. Holden has hereunto set his hand and seal this 12th day of May, 1904.

(Signed) HOWARD M. HOLDEN.

EXHIBIT D.

(Copy.)

Lease.

This indenture, Made and entered into this 16th day of February, 1905, by and between The National Bank of Commerce of Kansas City, Missouri, party of the first part, and the Holden Land & Live Stock Company, a corporation, organized under the laws of the state of Missouri, party of the second part, Witnesseth:

That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, its successors and assigns, has demised, leased and rented to the said party of the second part (subject to the leases and tenancies hereinafter mentioned) the following described real estate, situate, lying and being in the County of Shawnee and State of Kansas, Viz: (Here follows description of lands in Shawnee County, Kan., appearing in
54 said amended petition) being the same land heretofore conveyed by said Holden Land and Live Stock Company to The Inter-State Trading Company, and by said Inter-State Trading Company conveyed to the said party of the first part.

To have and to hold The said above described premises, with all the privileges and appurtenances belonging to the same (subject to

the leases and tenancies hereinafter mentioned), unto the said party of the second part, its successors and assigns, for a term of one year, which year commenced on the 1st day of January, 1905, and is to end on the 1st day of January, 1906.

The said first party acquired title to the above described premises from the said second party, through a mesne conveyance and it has been represented to said first party that at the time of the conveyance of said real estate by said second party, under which conveyance said first party claims title, certain portions of said above described real estate had been leased to and was occupied by tenants of said second party, said leases to expire on the 1st day of March, 1905. This lease is made by said first party, and accepted by said second party, subject to the leases aforesaid.

In consideration of the leasing of the premises aforesaid by said first party to said second party, and for the use and occupation of said premises during the term above mentioned, that is, from the 1st day of January, 1905, to the 1st day of January, 1906, the said second party hereby promises, agrees and bonds itself to pay
55 to said first party the sum of Ten Thousand Dollars ($10,000.00) on or before the said 1st day of January, 1906; and hereby further agrees that it will not sub-let said premises, or any portion thereof, or assign this lease, without the written assent of the said party of the first part, had and obtained thereto; that it will at all times during the term of this lease, at its own expense, maintain and repair all the buildings and fences belonging to said premises, or which may at any time during said term be erected thereon; and the said premises, and every part thereof, in as good repair as they were at the commencement of the term of this lease, will peaceably surrender and deliver up to the said party of the first part, its successors and assigns, on the said 1st day of January, 1906, loss by fire, storm and unavoidable accident, and ordinary wear and tear only excepted.

And the said party of the second part hereby further agrees that the said party of the first part shall have and be entitled to a lien upon all of the crops, of every kind whatsoever, grown upon said premises during the said year from January 1st, 1905, to January 1st, 1906, to secure the payment of the said sum of Ten Thousand Dollars ($10,000.00) the rental to be paid by said party of the second part to said party of the first part for the use and occupation of said premises; and that said first party, its successors and assigns, shall have the right to enforce the said lien in any and every lawful manner not contrary to the laws of the State of Kansas.

56 In witness whereof, The said parties have caused this lease to be signed by their respective Presidents, and attested by their corporate seals, the day and year first above written.

[SEAL.] THE NATIONAL BANK OF COMMERCE OF KANSAS CITY, MISSOURI,

(Signed) By W. S. WOODS, *President.*

[SEAL.] HOLDEN LAND & LIVE STOCK CO.,

(Signed) By H. M. HOLDEN, *Pres.*

STATE OF MISSOURI,
County of Jackson, ss:

On this 16th day of February, 1905, before me appeared W. S. Woods, to me personally known, who, being by me duly sworn did say that he is president of the National Bank of Commerce of Kansas City, Missouri, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said W. S. Woods acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto subscribed my name and affixed my notarial seal at my office in Kansas City, the day and year last above written.

My commission expires Sept. 5, 1906.

(Signed) HORACE G. CRAIG, JR.,
[NOTARIAL SEAL.] *Notary Public in and for Jackson County, Missouri.*

STATE OF MISSOURI,
County of Jackson, ss:

On this 27th day of February, 1905, before me appeared
57 H. M. Holden, to me personally known, who, being by me duly sworn, did say that he is president of the Holden Land and Live Stock Company, a corporation organized under the laws of the State of Missouri, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of the said corporation by authority of its Board of Directors, and said H. M. Holden acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I have hereunto subscribed my name and affixed my Notarial Seal, at my office in Kansas City, the day and year last above written.

My commission expires Feb'y 23, 1909.

[NOTARIAL SEAL.] (Signed) E. F. ROGERS,
Notary Public in and for Jackson County, Missouri.

"Plaintiff's Reply."

Now come plaintiffs and for reply to answer of second amended petition of defendants herein say and aver:

1st. Plaintiffs deny each and every allegation in said answer contained.

2nd. Further replying the plaintiffs say that the lease mentioned in said answer as "Exhibit D" was entered into by and between the parties thereto as a part of the general purpose, understanding, and scheme of said parties as set forth in plaintiffs' petition and for the purpose of securing to said Bank the rentals from the lands
58 described in said lease to be applied to the indebtedness of said Holden to said Bank as set forth in plaintiffs' petition; that said Bank was not on said 16th day of February, 1905, the owner of said real estate and had no interest whatever in the same except

a lien thereon for the payment of the indebtedness of said Holden to said Bank described in plaintiff's petition. Plaintiffs say that said Bank never claimed any rights under said lease and fully recognized that the same was only understood and intended by the parties thereto as security for said indebtedness; that said Bank never demanded of plaintiffs the payment of the said sum of $10,000.00 for the use and occupancy of the said premises during the pretended term of said lease from January 1, 1905, to January 1, 1906; that said pretended lease by its own term expired on said last mentioned date; and that after said last mentioned date a large portion of said land was sold and the proceeds of such sales were applied to the payment of said Holden debt; that thereafter the plaintiffs continued in the possession of said lands using and occupying the same as owners thereof and making valuable and lasting improvements thereon at their own expense; that plaintiffs' occupancy of said lands as owners thereof has always been recognized by said Bank; that said Bank never claimed the right to the possession of said land, but on the contrary acquiesced in and recognized plaintiffs' possession as owners thereof; that since the execution of said pretended lease the said Bank has never claimed any interest in said lands except its lien thereon for the payment of said Holden indebtedness and has
59 wholly abandoned any and all pretended rights given it by said pretended lease and has ever treated the same as a mere form of security for said indebtedness. Plaintiffs further say that said Bank has at all times since the execution of the contracts and agreements set forth in plaintiffs' petition recognized the plaintiffs as the owners of the real estate described in plaintiffs' petition and has only claimed a lien on said real estate to secure the payment of said indebtedness of said Holden; that plaintiffs have always claimed that said contracts, agreements, and conveyances were executed solely for the purpose of securing the said indebtedness of said Holden to said Bank and that the defendants herein have always acquiesced in the interpretation placed upon said transactions by the plaintiffs until the filing of their answer herein; that defendants being fully aware and knowing that the plaintiffs understood and considered that they were simply giving the Bank a lien on said real estate for the payment of said indebtedness, acquiesced in such understanding and interpretation and allowed the plaintiffs to continue in the possession and use of said lands as owners, making valuable and lasting improvements thereon, and that having so acquiesced in plaintiffs' understanding of said transactions the defendants are now estopped from claiming that said transactions in regard to the said contracts and conveyances had any other force and effect than to give the said Bank a lien on said real estate to secure the said indebtedness of Holden.

60 Plaintiffs having fully replied ask for judgment and decree as prayed in their said petition, and for all proper relief.

——— ———,

——— ———,

Attorneys for Plaintiff.

Reference.

The case was duly referred to Hon. J. B. Larimer to hear and determine the issues and report his finding of facts and conclusions of law. He tried the case upon the following evidence, which was returned into court with his report, and made a part of the record.

Plaintiffs' Testimony.

HOWARD M. HOLDEN, on behalf of plaintiffs, testified as follows:

Direct examination:

Am 72 years old. Lived in Kansas City, Mo., 43 years. President of Holden Land and Live Stock Co. Familiar with lands in Shawnee County, Kansas, described in petition. He and his company have owned the lands for 25 years. Lands were owned by the Holden Land and Live Stock Co. in 1901. July 1st, 1901, Mutual Benefit Life Insurance made the Holden Co. a loan secured by first mortgage on the lands.

There was a prior mortgage on the property of about $100,000 to a man named Shaw in Boston, and the purpose of making this loan was to pay that off and also to pay some liabilities due to the
61 National Bank of Commerce, some liabilities of the Brush Creek Coal Mining Company and the proceeds of this loan of $90,000 went toward this end. The net proceeds of that loan were $87,750.

Q. What did you do with the net proceeds of that loan?

A. It was deposited in the National Bank of Commerce.

Q. That is the defendant Bank?

A. Yes, sir; the two transactions came right together.

Q. Go ahead with the transaction with the bank.

A. The loan of $80,000 was made from the bank on one year's time at eight per cent and the Mutual Benefit mortgage was for five years at five per cent. The eighty thousand dollar loan with the bank was discounted at eight per cent for the year and also for some days in advance of the year and as security the bank had a second mortgage on the Kansas land that the Mutual Benefit Company had the first mortgage on, and the bank also had a conveyance to its vice president, Mr. Winants for the 110 acres in Jackson County, Missouri, which was free and unincumbered excepting a mortgage of $4,200 which was upon the land when I bought it and it was subject to that mortgage and they also had a lot of coal mining companies' first mortgage bonds and stock in that company, that was the security that the bank had.

Q. I think that the pleadings state that the Holden Company gave to you a note for $82,000, explain that to the court?

A. The Holden Company gave me a note for $82,000 and
62 a mortgage on this Shawnee County land, it being a second mortgage to the Mutual Benefit Company mortgage and I endorsed this paper to the bank and in that way they had a second mortgage on the Shawnee County land.

Q. Have you in your possession the original $80,000 note which you gave to the bank?

A. Yes, sir.

Q. Will you produce it? (Witness here produces note.)

Q. This is the note which you gave to the bank for $80,000?

A. Yes, it is.

Mr. GARNETT: We offer this note in evidence.

The note in question was marked Exhibit 1 by the stenographer and is in words and figures as follows, to-wit:

* * * * * * *

$80,000.00.

No. 123,351.

KANSAS CITY, Mo., *July* 1, 1901.

Due July 5, 1902.

One year after date, for value received, I promise to pay to the order of The National Bank of Commerce, of Kansas City, Mo., Eighty Thousand and No/100 Dollars, at the National Bank of Commerce, Kansas City, Mo., with interest from maturity until paid, at the rate of eight per cent per annum. To secure the payment of this note and of any and all other indebtedness which I now owe to said Bank, or may owe it at any time before the payment of this note, I have hereto attached as collateral security, the following note of Holden Land & Live Stock Co. for $82,000.00, payable to
63 and endorsed by me, dated July 1, 1901, payable one year after date, and mortgage securing same on 5603 & 44/100 acres of land in Shawnee Co., Kans.; also $69,000.00 of first mortgage bonds of Brush Creek Coal & Mining Co.

All dividends and maturing coupons pending life of this loan shall be paid to holder of this note.

The above collateral has a market value of $—. If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of said holder; otherwise, this note shall mature at once. Any assignment or transfer of this note, or other obligations herein provided for, shall carry with it the said collateral securities and all rights under this agreement. And we hereby authorize W. A. Rule, or, in case of his death, absence, or refusal to act, the then acting Cashier of said Bank, on default in payment of this note or any part thereof, according to the terms hereof, to sell said collateral or any part thereof, at public or private sale and with or without notice and by such sale the pledgor's right of redemption shall be extinguished.

HOWARD M. HOLDEN.

Endorsements on back: $2,000.00. Interest paid to Aug. 4, 1902. July 21, 1902. Credit. Interest paid to Sept. 3, 1902. Interest paid to Oct. 3, 1902. Interest paid to Nov. 2, 1902. Int. paid to
64 Dec. 2, 1902. Int. paid to Jan'y 1, 1903. Int. paid to Jan. 31, 1903. Int. paid (5-5) to Apr. 15, 1903. April 15th credit $3,140.00. Entered 5-5. May 27, 1903, Credit bond note $933.70 June 3, 1903, Credit Bond note $1,035.00.

The following appears stamped on face of above note: National Bank of Commerce, Kansas City, Mo. Paid June 18, 1903. Discount Teller. (R. 5 to 8.)

Received credit for $73,528.89, proceeds of the note and gave back to the bank check for $426.67.

Mr. GARNETT: What was that check given for?

A. It was claimed by the bank that it was for interest for a certain number of days, I believe, from June 7th, interest on the $80,000 which Dr. Wood said the bank had been keeping ready for this loan.

Q. How much did you get altogether as the net proceeds of that loan of $80,000 from the bank?

A. $73,102.22, I believe that is the correct amount.

Q. Is that all the money you received from the bank as the net proceeds of that $80,000 loan?

A. It was.

Q. What was done with that money, how was it deposited?

A. It was deposited in the National Bank of Commerce.

Q. In the name of The Holden Land and Live Stock Company?

A. Yes, sir.

65 Q. You say you had a deposit of $87,750?

A. Yes, sir.

Q. As the net proceeds of The Mutual Benefit mortgage?

A. That is right.

Q. Making altogether a total of $160,852.22?

A. Yes, sir.

Q. Do you have any independent recollection of what rate of interest they charged you on the $80,000 loan?

A. 8 per cent.

Q. On what amount?

A. 8 per cent on $80,000.

Q. Calculated for how long?

A. I think it was for one year and five days, up to the 4th of July, there were three days of grace and then the 4th of July so it was really due on the 5th of July I suppose, making a year and five days, I think.

Q. And the $426.67, what rate was that?

A. 8 per cent.

Q. On what amount?

A. $80,000.

Q. Had you any written contract with the bank agreeing to pay 8 per cent on $80,000 for that period of time?

A. Not that I know of or have any recollection of and I am sure that I did not.

Q. Had you any contract with them to pay interest on that sum from the 7th day of June to July?

A. I have no recollection of anything of that kind and nothing was ever said before regarding this that I remember of and I am sure there was not.

66 Q. If you remember, what was said between you and the bank's president?

A. I have no recollection of anything having been said till Dr. Wood spoke about it on the date of this transaction.

Q. That is the time that you closed the transaction?

A. Yes, on the first day of July, it possibly might have been on the second, I didn't get entirely through with the Mutual Benefit people and it was on the 1st and 2nd, it all dated from the 1st day of July (R. 10 to 12).

Witness acquired title to the 110 acres of land in Jackson County, Mo., in 1899, and paid several thousand dollars of the purchase money. In April, 1901, borrowed of defendant Bank six or seven thousand dollars to finish his payments. At the suggestion of Dr. Woods, the president of the bank, he had Mr. Bayse, the grantor, make the conveyance to Mr. Winants, the vice president of the bank. Gave his note for the amount advanced by the bank, which was paid off on July 1st, 1901, at the time of the mortgage transaction. No written memorandum was given him by Winants or any officer of the bank to show that they held title in trust in that way. He never asked for any. At the time he gave his note to the bank for $80,000 he took up all his indebtedness to the bank. He owed the bank about $15,000, and the coal company owed about $25,000, and he paid both out of the proceeds of the mortgages. When deed was made to Winants witness took possession of the land and has continued in possession ever since. Held possession and collected rents and rented it out to different parties and repaired houses upon it and took general care of the land. Paid part of the taxes.

67 The Shawnee County lands were well worth $250,000.00 in 1901. In July, 1902, sold S. ½ of S. W. ¼ of Sec. 2, Twp. 10, R. 13, for $5,000, and applied $3,000.00 to the Mutual Benefit mortgage and $2,000.00 to the bank as credit on the $80,000.00 note. In spring of 1903 made five sales—aggregating 559 acres—for total sum of $26,300.00.

The Mutual Benefit Company, by Bartlett Bros., its agents, for purpose of making releases, had the Shawnee County lands appraised in separate tracts. These tracts sold for $1,954.55 more than that appraised value. Out of the proceeds of the sales of $26,300.00, $12,000.00 was paid on Mutual Benefit mortgage.

In June, 1903, two notes were taken in renewal of the $80,000 note, one for balance of the principal and the other for interest. They were offered in evidence and are as follows:

Copy of Note.

3,790.35.

$72,891.30. KANSAS CITY, MO., *June 17th*, 1903.

Thirty days after date, for value received I promise to pay to The National Bank of Commerce of Kansas City, Mo., or order, Seventy Two Thousand Eight Hundred Ninety One 30/100 Dollars, at the National Bank of Commerce of Kansas City, Mo., with interest from maturity, payable annually, at the rate of eight per cent per annum, and if not so paid, compounded.

68 And as collateral security, for the payment of this note and interest thereon, and of any and all other liabilities and

obligations of the undersigned, now held or to be hereafter held by said National Bank of Commerce, of Kansas City, Mo. (hereinafter called "Bank"), now due or to become due or which may be hereafter contracted or existing, the following described personal property, the ownership of which is specially represented to rest in the undersigned, free of all incumbrances, and with full power to pledge the same, and to be of the market value of $—, is hereby delivered and pledged to said Bank, to-wit:

Note of Holden Land & Live Stock Co. dated July 1, 1901, $82,000.00; Cert. No. 17 for 548 shares, No. 18 for 132 shares, No. 2 for 1 share, No. 19 for 67 shares Brush Creek Coal & Mining Co. (748 shares of $100.00 per share par value); 138 Bonds Brush Creek Coal & Mining Co. $500.00 each amounting to $69,000.00; Notes of Le Roy P. Hartzell, $500.00, $1,000.00 $1,000.00, $1,000.00, all dated Apr. 1, 1903, secured by mortgage; Notes Jones Anderson four at $400.00 each *all* dated Apr. 1, 1903, secured by Mortgage; Notes of John E. James two at $1,025.00 each dated Apr. 1, 1903, Secured by Mortgage.

The undersigned (hereinafter called the pledgor) agrees to deliver to said Bank additional securities to the satisfaction of the President and Cashier of said Bank, if in the judgment of said President or Cashier, those above described shall depreciate in value. Full
69 power and authority is hereby given to said Bank, its officers and agents, to sell, transfer and deliver the whole or any part of said collaterals or any additions thereto or substitutions therefor, or any other securities or property of the pledgor, now or at any time hereafter in the possession of said parties or either of them, whether for safe keeping or otherwise, and at a public or private sale, at the option of said Bank, or its officers, on the non-performance of the promises herein contained, or on the non-payment of this note, or any part thereof, at maturity or at any time thereafter, or before, in the event said securities depreciate in value, with or without advertisement or notice to the pledgor or the presentment for payment of said note or other obligations herein provided for, all of which are hereby expressly waived. The said Bank, its officers and agents, are severally released from all duty and diligence to sell, enforce, secure or collect any part of the collateral herein mentioned and from all liability by reason of any step taken in the premises or under this agreement. Any assignment or transfer of this note, or other obligations herein provided for, shall carry with it the said collateral securities and all rights under this agreement. At any sale made hereunder, the said Bank, or any one for it, may become the purchaser of any part or all of said securities, fully discharged and released of any and all right of redemption on the pledgor's part. In case of deficiency, the pledgor promises to pay the amount of such deficiency forthwith. If said collaterals are sold publicly the
70 same may be done at the west front door of the United States Court House at the southeast corner of Ninth and Walnut Streets, in Kansas City, Missouri, by the President, Cashier or other agent of said Bank. Should the said Bank, or its assigns, or other holder of the obligations herein provided for, give any notice of a

public sale, it shall be sufficient to do so by hand-bills posted in five public places in Kansas City, Mo., for seventy-two hours before the time of sale. The proceeds of said sale or sales shall be applied, first, to the payment of all costs or expenses of said sale; second, to the payment of said note or notes, or other obligations, at the option of said Bank, whether then due or not due, and interest, making proper rebate for interest on liabilities not then due; third, damages and attorney's fees; fourth, to the satisfaction of any other note or other claim held by said Bank against the pledgor; and the balance, if any, to be paid to said pledgor.

The undersigned hereby authorizes and empowers the said Bank, at its option, at any time, to appropriate and apply to the payment and extinguishment of any of the above named obligations or liabilities, whether now existing or hereafter contracted, and whether now held or hereafter acquired by said Bank, any and all moneys now or hereafter in the hands of said Bank on deposit or otherwise, to the credit of or belonging to the undersigned, whether said obligations or liabilities are then due or not.

HOWARD M. HOLDEN.

No. 153,215.
Due July 20, 1903.

71 On the back of this note appears the following: Int. pd. to Aug. 20, '03.

Above note is stamped on its face as follows: "National Bank of Commerce, Kansas City, Mo. Paid Mar. 8, 1904. Discount Teller" and in writing "By Renewal."

* * * * * * *

Copy.

$1,586.85. KANSAS CITY, Mo., *June 17th*, 1903.

Thirty days after date, for value received, I promise to pay to The National Bank of Commerce of Kansas City, Mo., or order, Fifteen Hundred eighty Six 85-100 Dollars, at the National Bank of Commerce of Kansas City., Mo., with interest from maturity, payable annually, at the rate of eight per cent per annum, and if not so paid, compounded.

(Then follows precisely the same statement and provisions as in above note of $72,891.30, beginning with the words "and as collateral security" and ending with the words "then due or not," just above the signature.)

No. 153,216.

HOWARD M. HOLDEN.

Due July 20, 1903.

On the back of this note appears the following: Credit Sep. 12, 1903, $500.00. Credit Oct. 9, 1903. 90.00. Int. pd. to Aug. 20-03. Int. pd. to Sep. 18-03.

72 Above note is stamped on its face as follows: "National Bank of Commerce, Kansas City, Mo. Paid Mar. 8, 1904. Discount Teller" and in writing "By Renewal."

* * * * * * *

The COURT: What is the date and the amount of those notes?

A. They are dated June 17, 1903, one note is for $72,891.30, the other note is for $1,586.85.

Q. Take these notes and explain to the court how the amounts were arrived at for which these notes were given?

A. The large note for $72,891.30 was for the principal of the $80,000 note remaining unpaid according to the endorsements upon it, and the $1,586.85 was for interest on that balance of $72,891.30 that was unpaid on the $80,000 note from April 15th to June 17th at 8 per cent and the discount for 33 days that the new note would have to run, the interest on that interest for 30 days, interest on the two notes, that is, interest on the interest on the two notes for 30 days making $1,586.85, interest for 30 days, it should be 33 days, I omitted to count the days of grace (R. 24 to 32).

Witness explains credits on notes. All three of the credits for interest on these notes came from the proceeds of purchase money notes.

Note of date March 8, 1904, given in renewal of the two notes dated June 17, 1903, produced and offered in evidence. It is as follows:

73 **Copy.**

No. 163,138.

$77,873.90.
Due April 10-04.

KANSAS CITY, MO., *March 8th*, 1904.

Thirty days after date, for value received, I promise to pay to the order of The National Bank of Commerce, of Kansas City, Mo., Seventy Seven Thousand, Eight Hundred and Seventy three and 90-100 Dollars at The National Bank of Commerce, Kansas City, Mo., with interest from maturity until paid, at the rate of eight per cent per annum. To secure the payment of this note and of any and all other indebtedness which I now owe to said Bank, or may owe it at any time before the payment of this note, I have hereto attached, as collateral security, the following collateral security, viz: fully described on reverse side of this note—See over.——

All dividends and maturing coupons pending life of this loan shall be paid to holder of this note.

The above collateral has a market value of $100,000.00. If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of said holder; otherwise, this note shall mature at once. Any assignment or transfer of this note, or other obligations herein provided for, shall carry with it the said collateral securities and all rights under this agreement. And we

hereby authorize W. A. Rule, or, in case of his death, absence,
74 or refusal to act, the then acting cashier of said bank, on default in payment of this note or any part thereof, according to the terms hereof, to sell said collateral or any part thereof, at public or private sale and with or without notice, and by such sale the pledgor's right of redemption shall be extinguished.

HOWARD M. HOLDEN.

On back of said note appears the following:

Covering and securing the within note the following collateral is pledged under the agreement herein set forth on reverse side of this note—viz: Note of Holden Land and Live Stock Company dated July 1st, 1901, for $82,000.00 also certificate No. 7 for 548 shares No. 18 for 132 shares No. 2 for one share No. 19 for 67 shares of the Brush Creek Coal and Mining Co. (total 748 shares $100 per share par value) also 138 bonds of Brush Creek Coal and Mining Co. of $500 each amounting to $69,000 notes of L. P. Hartzell one for $500 and three for $1,000 each all dated April 1st, 1903, all secured by mortgage, also notes Jones Anderson—four for $400 each all dated April 1st, 1903, secured by mortgage—also two notes of John E. James for $1,025 each dated April 1st, 1903.

HOWARD M. HOLDEN.

Credit.

April 7, 1904, $515.35 bal. of one $1,025.00 James note and Int.

Credit April 9th, 1904, $90.00 Hartzell int.

Credit April 13, 1904, $410.50 part James note and int. $386.50. (Int. Anderson note $24.00.)

* * * * * * *

75 Q. Now, Mr. Holden, you say this is a renewal of the other two notes?

A. Yes, sir.

Q. How was this amount arrived at, the $77,873.90?

A. It was the amount that the bank figured up was due up to that date on the other two notes and 33 days' discount in addition to that.

Q. Is that the last note you gave to the bank in renewal of the $80,000 note?

A. Yes, sir.

Q. You have testified about the sales of the land up to that time?

A. Yes, sir.

Q. You may now explain to the court about these records if you have an independent recollection of them?

A. On this note given on March 8, the last note, the following endorsements appear, April 7th, 1904, $515.35, being the balance of one $1,025 James note and the interest; April 9th, I believe it is, 1904, $90 Hartsell interest paid, April 18, 1904, $410.50, consisting of another James note and interest $386.50 and interest on the Jones-Anderson note of $24. These two amounts make $410.50 (Record 41 to 43).

There were no further renewals of the note and early in May, James A. Patton, an officer of the bank, I think they called him

claim agent, came to office of witness and stated that Dr. Woods had sent him there.

"A. He said that the bank wanted to get the debt into a different shape and especially he spoke of the Kansas laws relating to foreclosures, the long time that they had for redemption and that if they had to rely on that it would keep them out of their money or
76 the property in the state of Kansas for a long time and he said that Dr. Woods had determined to sell out the security unless I would put it in a different shape under the power to sell which they had in the note which they held. That was the note of March 8th.

A. As near as I remember I said that to him, that the security was abundant that the sales in progress of course had been stopped by the flood, that there were signs that we were going to get away from the depression caused by the flood and that I had sales in prospect of being soon concluded and that if it was satisfactory to the bank to let the matter rest for a little while that I was satisfied that I could rapidly reduce the amount of the debt.

Questions by Mr. GARNETT:

Q. Is that what you said to him?

A. Yes, sir, that is the substance.

Q. What did he say?

A. He said that he was sent there by Dr. Woods to demand that the matter be put into a different shape and either at that interview on that day or a day or two afterwards he presented to me a paper which had been drawn up and which they desired I should execute.

Q. Have you that paper with you?

A. Yes, I have it (Witness here produces the paper).

Mr. GARNETT: The plaintiff now offers the paper in evidence.

Counsel for the defendant objected to the offer as incompetent, irrelevant and immaterial.

77 The COURT: Objection overruled; to which ruling the defendant at the time duly excepted and still excepts.

The paper in question was marked Exhibit 6, by the stenographer and is in words and figures as follows, to-wit:

Agreement.

This Agreement, made and entered into this 5th day of May, 1904, by and between William S. Woods, of Jackson County, Missouri, party of the first part, and Howard M. Holden of Jackson County, Missouri, party of the second part, witnesseth:

First, the said second party having made a deed of conveyance and a bill of sale to said first party, conveying to said first party certain property, both real and personal, described as follows (describing the property but not including the 110 acres in Jackson County, Mo.).

Subject to the rights of way of the Union Pacific Railroad Company, and the Chicago, Rock Island and Pacific Railroad Company, now crossing said land; subject also to a mortgage executed by said

party of the first part to The Mutual Benefit Life Insurance Company, dated June 6th, 1901, filed for record June 7th, 1901, and recorded in Volume 276 at page 473 in the office of the Register of Deeds for Shawnee County, Kansas, which mortgage was given to secure a note for ninety thousand ($90,000) dollars as described therein.

78 The above described land containing in all five thousand six hundred and three, and forty-four hundredths (5,603.44) acres.

Except, such portions of the above described land as may have been heretofore sold and conveyed by the Holden Land & Live Stock Company.

Also the following personal property which I have this day sold, transferred and assigned as a part of the consideration above recited.

Certificate No. 7, for 548 shares and Certificate No. 18, for 132 shares and Certificate No. 2, for one share and Certificate No. 19 for 67 shares of the Brush Creek Coal & Mining Company stock (total of 748 shares at $100 per share).

Also 138 bonds of the Brush Creek Coal & Mining Company of $500 each amounting to $69,000.

Also notes of L. P. Hartzell as follows: One note for $500, and three for $1,000 each, all dated April 1st, 1903, all secured by mortgage.

Also notes of Jones Anderson as follows: Four notes for $400, each all dated April 1st, 1903, and secured by mortgage.

Also one note of John E. James for $1,025, dated April 1st, 1903, secured by mortgage.

Second, in consideration of the above transfer it is further agreed by and between the parties hereto that the party of the first part will make application of the proceeds of the collection of any of the above described notes, or any of the property sold, on or before November 5th, 1904, upon the total amount of $80,410.86,

79 the sum agreed upon at which price when so received W. S. Woods, the party of the first part, agrees to sell and make proper transfer to Howard M. Holden or to any one suggested by him.

It is hereby agreed and understood that the party of the second part may by the consent of the party of the first part, sell such of the properties hereinbefore described at a price to be mutually agreed upon by and between the parties hereto, and that on or before November 5th, 1904, an accounting will be had of the property sold, and if said second party fails to sell the property (after including the amounts of collections and sales), for the fixed sum of $80,410.86 strictly in accordance with the terms and conditions hereinabove set forth then the right of said second party to sell said property shall terminate and he shall not hereafter have any right to make the sale of said property under the terms of this contract, and shall have no claim upon said first party for any expenses incurred, or any work or labor done by him in efforts to make a sale of said property.

It is further agreed by and between the parties hereto that said second party shall not have the right as the agent of said first party

as herein provided, to bind said first party by any contract or agreement, verbal or written, but the said first party hereby agrees and binds himself faithfully to carry out any contract for the sale of said property which said second party may make in strict accordance with the terms of this agreement.

80 In Witness Whereof, the said parties have hereunto subscribed their names the day and year first above written (Record 44 to 50).

——— ———.
——— ———.

Mr. Patton called on witness several times. "He said he was instructed by Dr. Woods to insist on having the matter put in different shape, so they would be able to control the matter better than they could in the present condition. That they wanted it nearer under their control than it would be under the laws of Kansas as to foreclosure. Thinks there were several of these interviews.

A. The matter ran on for several days in that condition and disagreement, I unwilling and refusing to meet their demands and he representing to me at each of the interviews the course that Dr. Woods had said that he would follow out in closing out my securities under the power to sell in the note. That I knew that he could do without any notice to me or remedy for me and I was greatly agitated about it.

Mr. DEAN: We move to strike out the answer of the witness:

The COURT: The motion will be sustained as to the latter part. To which ruling the plaintiff at the time duly excepted and still excepts.

Q. Go on and state what else occurred, Mr. Holden?

A. On the 12th of May, it is possible it may have been
81 the 11th, but I think it was the 12th, that agreement of May 12th, that has been presented here was presented and it was demanded of me that I sign it and also a deed that they had drawn.

Q. On May 12th, it appears from the pleadings that you executed another note, have you that note with you?

A. Yes, sir.

Q. Will you produce it? (Witness produces the note.)

Mr. GARNETT: We now offer the note in evidence.

The note in question was marked Exhibit 7, by the stenographer and is in words and figures as follows, to-wit:

$6,253.30. KANSAS CITY, MO., *May 12th*, 1904.

On demand after date I promise to pay to the National Bank of Commerce of Kansas City, Mo., or order sixty-two hundred and fifty-three and 30-100 dollars, at the National Bank of Commerce, Kansas City, Mo., with interest from date payable annually, at the rate of eight per cent per annum. If not so paid, compounded.

Value Received.

HOWARD M. HOLDEN.

No. 165,696. Due D. M.

Q. What was the occasion for your executing that note?

A. That was given for an amount representing past due interest on the Mutual Benefit mortgage and for taxes that the Mutual Benefit Company had paid for 1903, and some charges that they made in connection with it. The bank paid that amount to the
82 Mutual Benefit Insurance Company and called upon me to make the note for the amount and I made this note.

Q. In relation to the signing of the contract dated May 12th, 1904, when was that note signed?

A. It was signed on the same day.

Q. Do you remember where you signed it?

A. I signed it at the bank.

Q. Where were you when you signed these contracts, this contract of May 12th?

Mr. DEAN: We object to the question as immaterial.

The COURT: Objection overruled; to which ruling the defendant at the time duly excepted and still excepts.

A. I think I was at Judge Robinson's office, but I would not be positive of it, I signed this at Mr. Patton's desk in the bank, I remember that distinctly.

Q. Who presented that contract to you on May 12th, for your signature?

A. They had it prepared in advance, I had nothing to do with the getting of this up.

Q. Is this the contract that you refer to of May 12th, the original?

A. Yes, sir.

Contract offered in evidence being the same as will be found on page 42 hereof (Record 53 to 56).

Q. Mr. Holden, this is an agreement between the Interstate Trading Company and yourself, do you know anything about that corporation?

A. I did not until that time, not until that document was presented to me, I did not know there was such a concern, I know something about it now however.

83 Q. Did you have any negotiations with any officer or anybody that pretended to be an officer or agent of the Interstate Trading Company?

A. I never did.

Q. Looking to the purchase of this land?

A. I never did.

Q. In regard to this transaction at all?

A. No, sir.

Q. Did you have any talk at all with any officer of the Interstate Trading Company?

A. I did not. I didn't know who they were, didn't know anything about the company, I never heard of it before that time.

Q. You say the first time you ever heard the name of the Interstate Trading Company was when this contract was presented to you to be signed?

A. Yes, sir.
Q. Who presented this contract to you to be signed?
A. Mr. Patten, the whole thing was handled by Mr. Patten.
Q. Do you know who prepared these statements?
A. I do not (Record 66 and 67).

Copy of deed from Holden Land and Live Stock Company to Inter-State Trading Company, dated May 12th, 1904, recorded October 12, 1904, in Book 304, page 442, purporting to convey the Shawnee County lands, was then offered in evidence, and marked "Exhibit 11," which can be found on page — hereof.

Q. By whom were you requested to make this deed?
A. By Mr. Patten.
Q. Did you make this deed on that date, May 12, 1904?
A. Yes sir.
84 Q. It was acknowledged on that date?
A. Yes, sir.
Q. What became of the deed after it was made?
A. It was delivered to the representative of the bank, Mr. Patten, or possibly to Judge Robinson, he may have taken it, I would not say for sure, our meetings were in his office several times when there was legal matter to be attended to such as this.
Q. Who prepared that deed?
A. I don't know, I did not.
Q. It was brought to you to execute, was it?
A. Yes, sir.
Q. Now, Mr. Holden, at the time you executed this deed and delivered it I will ask you if at that time or at any other time any consideration was paid to you or the Holden Land & Live Stock Company for this deed?
A. None, whatever.
Q. You say nothing was paid to you by the Inter-State Trading Company?
A. Nothing whatever.
Q. You were president of the Holden Land & Live Stock Company?
A. Yes, sir.
Q. Nothing was paid to the Holden Land & Live Stock Company at that time?
A. No, sir, nothing.
Q. When this deed was presented to you to be signed state to the court what was said between you and Mr. Patten, or the substance of it?

Mr. DEAN: We object as incompetent, irrelevant and immaterial for the reason that the conversation cannot be introduced for the purpose of modifying the conditions of the deed.
85 The COURT: Objection overruled; to which ruling the defendant at the time duly excepted and still excepts.

A. There were repeated interviews and the demand constantly kept up for me to submit to a change in the form of the paper, I was told that if I did not do so the security would be sold out under

the power given in the note. I saw that there was no escape from it and so I executed the contract.

Q. Mr. Holden, I want to ask you if this contract introduced in evidence and the deed was signed about the same time?

A. The deed and the contract?

Q. Yes.

A. The deed was delivered at the same time that the contract was delivered. I had my youngest son who was secretary of the company, at the noon hour is my recollection, when he was free from his other work to sign it as secretary, I think he signed it as secretary, that is my recollection about it and the transaction was closed up shortly after noon.

Q. At what time was that note for six thousand and some dollars signed, was that signed in the forenoon or early in the afternoon?

A. That was signed in the forenoon.

Q. I want to know whether or not the deed and the agreement were presented to you for signature at the same time, whether you signed them as part of the same transaction?

A. It was part of the same transaction, I don't remember whether they were signed at the same time, I had to take the deed and have it signed and have my son sign it and put the seal on it.

86 Q. I suppose there is no question about their being part of the same transaction, when was this agreement delivered to you?

A. When the deed was delivered.

Q. On what date?

A. On the 12th of May in the afternoon, shortly after noon as I recollect it.

Q. Have you had this original agreement in your possession ever since that time?

A. I have.

Q. Did you have any conversation or negotiation with anyone else on the part of the Inter-State Trading Company or the bank except with Mr. Patten about this matter?

Counsel for the defendant objected to the question as incompetent, irrelevant and immaterial and because all negotiations and conversations and stipulations and agreements are merged in the final contract and deed.

The COURT: Objection overruled; to which ruling the defendant at the time duly excepted and still excepts.

A. I did not, excepting as the conversations were taken part in by Judge Robinson or when he was present, he did not attempt to do any part of the negotiations with me, he never presented it or talked for it as the thing to be done, but he simply acted as an attorney assisting in carrying it out, it was all done by Mr. Patten acting under the instruction of Dr. Woods as he said. He said he was ordered to do so by Dr. Woods.

Q. You never saw Dr. Woods about the matter?

A. No, sir, I went to see him, but could not get access to him.

87 Q. After the time that you delivered this deed on May 12th, to the Inter-State Trading Company and after the contract of May 12th, 1904, was executed by yourself and

delivered to you and after you signed that note for six thousand and some odd dollars on May 12th, what occurred after that?

A. Nothing occurred until May 14th, the transaction was closed as I understood it. They had the contract and I had the agreement on May 12th.

Q. What did you do with the deed?

A. Mr. Patten took possession of it.

Q. He was the only man that you had any dealing with?

A. Yes, excepting as I stated, with Judge Robinson.

Q. You left the deed with him May 12?

A. Yes.

Q. He left the contract with you?

A. Yes.

Q. And you left the note with him dated May 12th?

A. Yes, the $6,200 note.

Q. Was there anything else done on May 12th, after that?

A. Nothing whatever.

Q. No negotiations on May 13th?

A. No, sir.

Q. Did you have any talk with them on May 13th?

A. No, sir.

Q. When was the next time you had any dealings with any of the parties to this transactions?

A. On May 14th Mr. Patten came to me and said they had decided they wanted to have it in some different shape and he presented an agreement that bears that date. I am not sure whether he called at my office or whether he telephoned me to meet him at Judge Robinson's office, there were so many meetings at that time.

88 Q. Have you with you the original agreement of May 14th?

A. I think you have it. I have a copy of it.

Mr. GARNETT: The plaintiff now offers in evidence the contract dated May 14th which is marked by the stenographer exhibit 12.

The paper in question was so marked by the stenographer and is in words and figures as follows, to-wit: (See page 47 of this Abstract of Record) (R. 82 to 86).

Q. Mr. Holden, who made that memorandum in pencil?

A. I didn't make it, Mr. Patten made it I assume, it is not in my handwriting.

Q. Was this agreement dated May 14th delivered to you on that date, on May 14th?

A. That is my recollection that it was.

Q. Have you had possession of it ever since that time?

A. Yes, sir.

Q. Now in that agreement there is something said about your placing some deeds in escrow, did you put any deeds in escrow that day?

A. No, sir, I did not; there was no other deed executed. The deed dated May 12th was the only deed that was executed by the Holden Company. That is the deed just referred to there.

Q. This contract recites that you placed some deeds in escrow which had been signed by you—how did you happen to sign this contract?

A. For the reason that I saw nothing else to do in order to avoid the selling of my securities.

Counsel for the defendant moved to strike the answer out as incompetent, irrelevant and immaterial and as not responsive to the question.

89 The REFEREE: Objection overruled

To which ruling the defendant at the time duly excepted and still excepts.

Q. This contract was presented to you just after the other transaction was closed?

A. Yes, sir.

Q. Do you remember the circumstances of this contract being presented to you?

A. Only generally, either Mr. Patten came to my office or I was asked to go to Judge Robinson's office, but whether it was one or the other I don't remember.

Q. At the time this contract was signed on May 14th, did any other papers pass between you?

A. No, sir.

Q. Did you deposit any other papers with any one at that time?

A. No, sir.

Q. Did you see any one else deposit any papers for anybody at that time?

A. I did not.

Q. It says that the bank deposited with Mr. Patten the collateral securities that you had left with him, did you see that deposit made on that date?

A. I did not.

Q. Who was James A. Patten?

A. He was same man that has been spoken of—the same man that has been spoken of in connection with this matter. He was the clerk or an officer there in the bank and he was the man who handled this matter for the bank.

Q. He was the only man you had any negotiations with?

A. He was the only man excepting Judge Robinson, and he was sometimes brought in as the lawyer for the bank.

90 Q. Do you know whether or not the Inter-State Trading Company that day deposited with Mr. Patten a note for any amount?

A. I do not.

Q. You did not see anything of it?

A. No, sir.

Q. It says that you deposited a bill of sale transferring to the Inter-State Trading Company certain bonds and shares of stock, do you remember that bill of sale?

A. I remember one executed May 12th but that is the last I ever saw of it.

Q. Have you a copy of that bill of sale of personal property?
A. No, sir.
The REFEREE: Did you ever have that bill of sale in your possession after it was executed, that original bill of sale?
A. No, sir; I never did.
Q. Have you ever seen it?
A. No, sir; I have never seen it.

Questions by Mr. GARNETT:

Q. It was delivered on May 12th?
A. Yes, sir.
Q. Referring to the transaction of May 12th, 1904, I will ask you if the bank or the Inter-State Trading Company or any one for them returned to you your note of May 12th, 1904?
A. No, sir, they did not; but they took another note on that same date.
Q. What other note did they take?
A. A note for $6,263.30, I believe.
Q. Did they also offer at that time to surrender and cancel and return to you your note that they held?
A. No, sir, they did not.
91 Q. And instead of returning the note they held they simply took another note?
A. They took another note, an additional note for the money paid on that date to the Mutual Benefit Company.
Q. Was there anything said between you and any of the defendants at that time about cancelling your indebtedness to the bank?
A. No, sir, nothing.
Q. Have you that note with you, the seventy thousand and odd dollars note?
A. Yes, sir.
Q. In this agreement of May 12th it is recited that in consideration of the conveyance you made that the first party, The Inter-State Trading Company had paid to the National Bank of Commerce the note executed by Howard M. Holden March 8th, 1904, for the sum of $77,873.90, and also this other note—I will ask you if the Inter-State Trading Company paid to the bank on that date the note marked exhibit 5?
A. I did not know at the time of their doing so—you mean did I know anything about it at that time?
Q. Yes, whether the Inter-State Trading Company paid the bank this note at that time?
A. It did not, that is, I don't know what they did at that time.
Q. It was not delivered to you on that date?
A. No, sir.
Q. Was there anything said about the paying of it?
A. No, sir, nothing.
Q. Where did you get this note which has been marked exhibit No. 5?
A. That note and the sixty-two hundred dollar note along
92 about the first of February, 1906, one day when I was in the bank on some other business, that note and the other note

were handed to me by Mr. Moore, the assistant cashier of the bank, Charles H. Moore. I was there to see Mr. Winants on some other business and his desk was adjacent to the desk of Mr. Moore and I was about to leave the bank and I heard someone calling me and I turned around and Mr. Moore had a package in his hand. He says, here is something I want to hand to you. I took it. I don't remember just what date that was but it was along in the first of February, 1906. I may be able to fix the exact date by research. I took it and opened the envelope and saw that it contained these two notes.

The REFEREE: Which two notes?

A. The note of seventy-seven thousand dollars and something and sixty-two hundred and fifty-three. I did not consider that I ought to have these notes and my first impulse was to hand them back, and I turned around and Mr. Moore had left his desk and was not in sight. I stayed there for half an hour or so waiting for him to return, and I didn't see him and I left the bank with the package in my hand and they have been in my possession ever since. That is the way I came to have them.

Q. Were there any other papers besides these two notes?

A. I think not, I have no recollection of there being any others. I think there were none.

Q. What position did Mr. Moore hold in the bank?

A. He was the assistant cashier.

93 Q. On the 12th day of May, 1904, the time you made that deed, the Holden Land & Live Stock Company made that deed to the Inter-State Trading Company did the bank give you a collateral note which they held of eighty-two thousand dollars?

A. No, sir, it did not. I have never seen that note since it was given in 1901 or the mortgage which secured it.

Q. Do you know what became of that note?

A. I do not.

Q. Where was that note when you last saw it, in whose possession was it?

A. In the possession of the National Bank of Commerce, it was taken by them as security for the eighty thousand dollar note.

Q. You have never seen it since?

A. No, sir.

Q. Mr. Holden, at the time of this transaction in May, do you know what the values of the securities held by the bank for the payment of this note of seventy-seven thousand dollars were?

A. I will have to figure a little bit. This note of seventy-seven thousand dollars was secured by a collateral note of eighty-two thousand dollars on the Kansas land and some other collaterals. Taking up the Kansas land it was mortgaged to secure a note at the bank, held as collateral. I will figure it out and give the court an idea, my idea of what this value was.

Q. You have some memoranda there, have you not, of what was left, how many acres was left?

A. At the time of this agreement?

Q. Yes, sir?

A. Yes, sir; but this question has not come up for my con-
94 sideration before this and I want a little time to think if you will allow me to do so so I can give a reasonable judgment about it.

Mr. DEAN: We object to this testimony as incompetent, irrelevant and immaterial.

The REFEREE: Objection overruled.

To which ruling the defendant at the time duly excepted and still excepts.

A. Do you want it stated separately?

Q. How many acres of land were left in this county covered by that mortgage?

A. About forty-nine hundred acres at this time.

Q. That was on May 12th—haven't you some memorandum to show about how many acres there were at that time?

A. Yes, 4,942.80 acres on hand May 12th, 1904, and according to Mr. Bartlett's valuation it was worth $213,026.45.

Q. I am asking for your opinion as to the value of that land?

A. I recall that I regarded them as being worth about $225,000.00. I had some negotiations pending at that time I remember and that was the valuation which I put upon the land, that it was well worth $225,000.00.

Q. What is your present opinion about it?

A. I think they were worth it, well worth it at that time.

Q. $225,000.00.

A. Yes, that is less than other people around there were asking for land.

Mr. GARNETT: The plaintiff now offers in evidence a map which contains a description of the land.

The map in question was marked exhibit No. 13 by the
95 stenographer and is hereto attached and made a part of this record.

Q. Mr. Holden, I wish you would tell the court—point out on that map the land securing this indebtedness at that time and fully describe the nature of the land?

A. Everything that is inside of the blue line, inside of the shaded line, was on hand May 14th excepting that eighty right there. That was sold in 1903 to Jones Anderson, eighty acres.

Q. I will ask you to take this blue pencil and mark out the pieces of land which had been sold prior to that time?

A. I have done so.

Q. Now, you have indicated on the map with blue pencil the tracts that were sold out at that time?

A. Yes, sir; all those not marked out were on hand May 14th, 1904.

Q. I want you to describe to the court each tract of land and the quality and character so the court may have some ideas to form an opinion from?

A. This piece here is upland, about sixty acres on the east side of

it was in cultivation. This is the southeast quarter of the east half of the southwest quarter of Section 12, in Township 10, Range 13, about 240 acres. That is mostly upland.

Q. Tell the court the character of that land?

A. It is very good upland, about sixty acres on the east side is improved, that is, partly improved. There is a house on the land.

Q. What other improvements are there on the tract?

96 A. There was an old house on it but it was not of much value. Section- 30, 31 and the southeast quarter of 36 and the south half of 32 and the land in Section 5 of about 245 acres and a fraction was all prairie pasture excepting about sixty acres in Section 30, that is in tame grass, that was in 1904. I am speaking about that time now, about sixty acres broken up and put in clover and timothy in the east part of Section 30.

Q. Was there any improvements upon it? Is it all fenced and cross fenced?

—. There are over forty miles of fencing on the place. There are no improvements on the land that I have already mentioned excepting on the southeast quarter of 32 there was a house and probably forty acres of grass broken out. The north half of Section 6 is upland, but it is improved. There is a house and an orchard upon it and approximately three-fourths of it is broken up and in crops. The southeast quarter of Section 6 is pretty near all bottom land. There is a tenant house upon it, a two story stone house and quite an orchard. That is the piece that was sold to Mitchell. The west half of the southeast quarter of 6 and the southwest quarter of 6 are bottom land excepting a little slope and the depot at Kingsville is on this quarter. There are two houses, a large barn and corn cribs, stock yards and wagon and stock scales upon it, and also other improvements upon it. And also going with this piece of land is about thirty-six acres in the northeast quarter of Section 7 north of the railroad that goes with that tract. Over in Section 1, the north-

97 east quarter, about three-fourths of it is upland and it is largely in blue grass and the southeast quarter of that quarter is bottom land in cultivation. The southeast quarter of Section 1 is all bottom land, but it is a good deal affected by the drainage of the water, very much indeed a portion of it. The southwest quarter of Section 1 is all bottom land south of the railroad. It is all tillable bottom land. There was no house on it at that time. In Section 12 the main improvements were in the southeast corner of the southeast quarter and then over here about there on the west line of the southwest quarter of 12 there is a two-story tenement house and quite a large barn. That is all fine bottom land. There is a bed of sand in here, but the west half, that is, in here on the west half, otherwise it is extra fine land. This is in Township 11. The other Section 12 is in Township 10. The southwest quarter of 18 is fine bottom land. It is a little affected by the flood, not very badly, though. This land in here in 13 north of the river, there is about 400 acres of it, that is all bottom land. There is a small house on the east half of it and there is a skirting of timber along the river bank. This

land in Section 14 across the river is bottom land north of the railroad, about 108 acres, all desirable bottom land.

Q. Now, besides this tract of land in Kansas of 4,942.80 acres what other security did the bank have on May 12th, 1904, for the payment of their indebtedness?

A. It had 110 acres of land in Jackson County, which
98 although it was not formally pledged to them I always considered it as behind my debt.

Q. This tract that was in the name of Winant?

A. Yes, it was originally pledged for the money I borrowed before this mortgage was made.

Q. You had no writing about it?

A. No, sir.

Q. That stood in Mr. Winant's name under a verbal understanding?

A. I left it for a continuing security for anything that I might owe to the bank. It was not formally pledged to the bank for the loan of Eighty Thousand Dollars.

Q. Mr. Winant conveyed that to the Inter-State Trading Company?

A. Yes, in 1904.

Q. Give the court some idea of the value of the 110 acres.

Mr. GARNETT: The plaintiff first desires to offer a map of Kansas City in evidence.

The map in question was marked by the stenographer Exhibit 14 and is hereto attached and made a part of this record.

Q. Indicate the position of that tract of land by a blue pencil mark around the tract on this map.

A. The tract of land is marked on the map with a blue pencil.

Q. How much of that land is in the city limits of Kansas City?

A. All excepting to this dotted line, all with the exception of this little piece in here. The limits follow certain section lines.

Q. In May, 1904, what was the market value of that 110 acres?

A. At least $350 would have been considered a fair value
99 of it at that time. From that to $400.

Q. Do you mean per acre?

A. Yes, that much per acre, at least that much, I would say at least $350 an acre. I base my opinion a good deal on the judgment of others in that regard. It was worth that at that time in my judgment, $350 to $400 an acre. At those figures it would be $38,500.

Q. Give to the court some idea of the uses to which that land could be put in order to make it worth that much money?

A. There is one railroad that runs right through it. It is really switch property. The Suburban Belt runs through it. The Kansas City Southern and the Missouri Pacific and the Frisco are directly across the river from it and close by. It is fine manufacturing property.

Q. Good for manufacturing plants?

A. Yes, none better, it is free from floods.

Q. You are speaking of the value of that land as it was in 1904, May, 1904?

A. Yes, at that time.

Q. What other securities did the bank hold for the payment of the $77,000 note?

A. The coal mine and the other securities that they held, casting out the thought of the land itself, taking in consideration the machinery, the personal property, the building, etc., I think it was certainly worth $10,000 at that time. They were worth more than that. At an inside figure it was safe to say $10,000 for the value of that.

Q. The stock of the company was pledged was it?

100 A. Yes, and they held $69,000 worth of the bonds, there was $70,000 of a bond issue upon the property. I had no part however in the issuing of these bonds.

Q. What other property did they have?

A. They had all the purchase money notes which were on hand. They were being paid to the bank. It was difficult for me to keep track of the amount at any exact time. The May 12th agreement I think describes them. There was $6,125 in notes, I think that is the right amount.

Q. Those were purchase money notes?

A. Some of the 1903 sales notes, the notes given on the sale of land in 1903.

Q. The bank collected all these notes after that?

A. They have all been paid since that time.

Q. They were at that time of that value, were they?

A. Yes, sir.

Q. What interest were the notes drawing?

A. Six per cent, the purchase money notes.

Q. What was the aggregate value of all the securities the bank held on May 12th?

A. Well, these figures that I have given make $279,625.00.

Q. What was the amount left from the Mutual Benefit note at that time?

A. The principal had been reduced to $73,000.

Q. That left over $200,000 of security for the bank yet?

A. That is right, the Mutual Benefit Mortgage had been cleaned up down to the principal by the payment of the $6,300 note, that was given for all arrears due to them and for all taxes paid by them.

101 Q. Did you ever propose to the bank to turn over all those securities to them in full satisfaction of your debt?

A. I certainly never did. I never even thought of such a thing.

Q. Did they ask you to turn it over in full satisfaction of your debt?

A. No, sir; they never did.

Q. Was anything said about turning over this amount in full satisfaction of the debt between you and any officers of the bank?

A. No, sir; there never was

Q. No conversation of this kind at all?

A. No, sir.

Q. Now referring to this map again, I wish you would explain to the court the condition of this Kansas land as to how it required more or less of your attention as to looking after it and looking after contracts in regard to the draining of it, etc., such matters as that?

A. That is a very long question. I would say in brief that unless you wish to give a great deal of time to the answering of this question that we had better not go into the details of it at this time. There are three sources of danger there from floods, there is the Kaw river, which is always giving us trouble, and right in here is a slough or an old river bed. Every time the waters run up very high it would tear across here and overflow a great deal of this land here. It would be a long story to tell the court and explain the trouble we have had on this land with the water getting up in order to keep it from being overflowed. We have built dams and they have been washed out. Right in here (indicating) is what is called the
102 Wagner water way. All along the river most everywhere there has been embankments, that is, there is a natural embankment that is higher than the land lying back of it. It looks just as though man had built it up and the river can get high and really higher than the land back of the river, and it would not overflow because of this embankment. This Wagner water way marks the boundary between what is called the first and second bottoms. There is a depression running along through that boundary through the entire place and also through the adjacent land to the east and to the west, but until 1903 I never knew any water to be in there. The land was all cultivated the same as other land, but in 1903 this embankment was washed out and a communication between this water way and the river was had when the river got high. The flood of 1903 broke down that embankment and caused the second river channel to be formed along through there for about five miles in length and fifteen or twenty feet in depth the water got to be in 1903, and it flooded this land all up in here. Since that time we have put in three dams there, the last one was put in last year at an expense of about $1,600 of which the county commissioners contributed $500. I think it is a more effective dam that the ones that we had before. We thought that we would not have any more floods after 1903, but it has washed out two times since then. Up here north of the railroad these water courses through here are always giving trouble in the wet season. Right along here there is a
103 culvert in the railroad and then there is another one down here and great volumes of water come through here and run down along the water way along down to the point on Section 7. It used to go along down this way, but they put a dam in there and that water course is now dammed up so the water all flows into this part of the land. We have the same trouble with this water here that everybody else in that neighborhood along those water courses have had. And of course there is a great deal of expense attached to it.

Q. After making the contract of May 14th, and continuously

down to this date, have you been looking after these matters you speak of in regard to this drainage proposition since the making of this contract?

A. We have continued to give the same attention to it as we did before and do the same kind of work as we did before. I have been to a great deal of expense, of time and effort in the matter and have always paid it out of my own pocket.

The COURT: Are these waterways natural or artificial?

A. They are artificial. I should say they are both artificial and natural waterways. Cross Creek comes down along here and it was never known to be out of its banks until 1903. The bridge here is the great obstruction. It stops up and backs the water up and the water backs up all over the town of Rossville. It was four or five feet deep all over the town in 1903. The railroad formed a dam down along here and through our place. The water runs
104 down along the railroad until it finds these culverts and it finally washes them out and overflows a great deal of the land. We really had more damage in 1904 from the flood from Cross Creek than at any other time. The land we have there is of such a character that it is necessary to keep a good man on the place all the time to look after it. I have been there frequently, but I could not stay there all the time or very long at any time (R., 92 to 108).

Q. Mr. Holden, there was something said in your examination about a note of $6,250, that was signed on May 12th, 1904, the date of this transaction. I will ask you if after signing that note you had any further negotiations with the defendants or either of them before signing the other papers, the deed and contract?

A. I did not.

Q. At the time you signed that note had the agreement of May 12th, been prepared and submitted to you?

A. Yes, sir, there was some change made in it, I think they included that note practically at the same time however, it all occurred within one or two or three hours, the transaction.

Q. You state you think there was some change made in this agreement after the note was signed?

A. Well, they included the amount of that note, it is interlined there in the agreement, shown there (Record, 110).

Q. I wish you would take the exhibit and explain to the court what you mean by some changes in the agreement?

A. Well, on the third page there is an interlineation of
105 these words, "and the amount of $6,253.30 this day advanced to the Mutual Life Insurance Company, as interest and taxes."

Q. Is that interlineation written with the same type that the main contract is written with?

A. It does not appear to be, the other is carbon and that seems to be original then the next page of the agreement is entirely an original copy, original typewriting and with different ink apparently different from the rest in that respect, the rest of the agreement, that includes also a reference to this $6,253.30 note.

Q. At the time you signed that note had all the terms of this contract been agreed upon between you?

A. Everything that had been said on the subject had been said previously to the signing of that note, as far as any agreement at all it was established.

Q. Was the signing of that note part of this main transaction?

A. It was (Record, 110 to 112).

Witness testified that after the flood in order to restore the land to its former condition:

"We rebuilt fences which were largely destroyed in the bottoms and repaired buildings, some of them were moved off the foundations and removed the great masses of debris and plowed the sanded spots and did everything that we could to wipe out the marks of the flood and overcome its effect; the water was from one to ten feet deep over the most of our bottom land and we had two miles of river frontage, so that it was very heavily affected by the overflowing of water."

Q. I believe you stated that up to this time the interest on both of these debts, the Mutual Benefit debt, and the one held by
106 the bank had been paid and these debts been renewed, I mean up to the date of making these contracts?

A. Up to the date of the flood?

Q. Yes, up to the date of the flood?

A. The interest had always been promptly paid and the taxes promptly paid up to that time, always.

Q. What was left of the Mutual Benefit debt at that time?

A. $75,000.

Q. And the bank's debt amounted to how much?

A. It was $72,891.30 and there was $7,150 of first mortgage purchase money notes held by the bank all of which have since been paid and those out left a debt of $65,741.30 to the bank (Record, 113).

Q. Now, Mr. Holden, after the transaction of May 12th and 14th, the signing of these papers, what did you then do with regard to handling these lands?

A. Well, I had a great amount of correspondence and interviews with parties, but I was hampered by the terms of those agreements and especially by the agreement of May 12th, which limited any sales to the whole property, sales in bulk and for cash entirely, customers were scarce that would buy on those terms, only speculators. I had an offer of $175,000 from one party, but I didn't consider that adequate and justifiable and declined it. Also this party wanted time on a portion of the purchase price, which I was not in a position to give.

Q. For what property was that offer made?

A. For the Shawnee County property only.

Q. Just for the land?

A. Yes, sir (Record, 114-115).

107 Witness states that at time of the transaction in question and the signing of the deeds and contracts, he was not represented by any attorney and that all the papers were prepared by somebody on the bank's side, he thinks by Judge Robinson, and that he, the witness, "had nothing to do with preparing any of them," also that when he learned a short time after it was done, that the bank had recorded the deed to the Inter-State Trading Company, he was displeased and surprised at it and went to Judge Scarritt in Kansas City, and talked with him which was the first time he had consulted any lawyer on the subject and Judge Scarritt dictated the addendum, which appears to the May 12th contract and then had it recorded on November 9th, 1904 (Record, 119).

Witness testified that in the latter part of November, 1904, Mr. Patton presented to him a lease to the Shawnee County lands from the Inter-State Trading Company, for his signature and that he refused to sign it and never did sign it. The following is a copy left with witness by Patton at the time (Record, 121-122):

Copy.

This agreement made and entered into this 29th day of November, 1904, by and between the Inter-State Trading Company, party of the first part and the Holden Land and Live Stock Company, party of the second part, witnesseth:

108 Said first party has and does hereby lease to said second party the real estate hereinafter described, lying in Shawnee County, Kansas, for a period to end February 28th, 1905, subject to such leases as tenants of said second party have of said real estate, or any portion thereof, such leases to expire on or before March 1st, 1905.

In consideration of the use of said premises up to said 28th day of February, 1905, the said second party hereby agrees to pay to said first party the sum of one dollar, and further agrees to surrender and deliver to said first party, on or before said 28th day of February, 1905, the peaceable possession of all of the premises hereby leased, in as good condition as the same now are, usual wear and tear alone excepted.

The real estate hereinbefore referred to and covered by this contract is described as follows:

(Then follows description of the lands in Shawnee County, Kansas, that are included in the deed and contract of May 12th, 1904.)

In Witness Whereof, the said Inter-State Trading Company has caused this contract to be signed by its president and the said Holden Land and Live Stock Company has caused this contract to be signed by its president, the day and year first above written.

THE INTER-STATE TRADING COMPANY,
By H. WILSON PRATT, *President.*
HOLDEN LAND AND LIVE STOCK COMPANY,
By —— ——, *President.*

109 Witness testified that the Holden Company collected all the rents for 1904, and did not account to the bank for any part of same and was never asked to do so; and that at the end of 1904, the Holden Company proceeded to rent the land to the various tenants for 1905, just as in previous years (Record, 127).

Witness then testified regarding the lease dated, Feb. 16, 1905.

A. Mr. Patten came to me about that time—the lease was executed or before and said the bank wanted some arrangement under which they——

Mr. DEAN: We object to the alleged conversation as incompetent, irrelevant and immaterial and not permissible under the statutes.

The COURT: Overruled.

To which ruling the defendants at the time duly excepted and still except.

(A. (Continuing:) Said the bank wanted some arrangement whereby the revenues of the place could come to the bank to apply on the debt and I told him I had no objection to that, had the debt to pay any way, and then followed the drawing up of this lease which I think Judge Robinson drew up, quite sure of that, and I remember the rate put in—elected the amount to put in $10,000 for the year January 1st, 1905, to January 1st, 1906, and I remember saying at the time to them——

Mr. DEAN: We object to what was said as all conversations were merged into a contract and such evidence is incompetent, irrelevant and immaterial.

110 The COURT: Overruled.

To which ruling the defendants at the time duly excepted and still except.

A. (Continuing:) I remember saying at the time that that amount was probably excessive in view of the still depleted condition of a portion of the lands in consequence of the flood, but that I would not object to it on that account. Of course I wished to pay in all I could and as fast as I could and the lease was executed accordingly. I paid upon it——

Q. I was going to ask you how much of the income of the land of that year you paid over to the bank?

A. I paid for that year $8,300.57, which was all, substantially all the income of the place after the tenants had their share.

Q. I will ask you if the bank or any of its officers or agents ever demanded of you any additional sum for that year?

A. It never did.

Q. I will ask you if they ever demanded of you the balance of the amount to make up the $10,000 for that year?

A. They have not.

Q. I will ask you if at the end of the year the bank said anything to you by any of its officers about renewing that lease for another year?

A. Never did.

Q. I will ask you if the bank or any of its officers or agents ever requested you to make any other lease after that?

A. It never did.

Q. I will ask you if you ever had any conversation with any of them about the rents of the place after that?

111 A. It was my plan and purpose to pay over just as much out of the income from the place and from any other source as I could to reduce the liability to the bank and especially to provide for interest coming which the bank people at a number of times spoke of, and that was the plan I carried out.

Q. I will ask you if you ever had any conversation with Dr. Wood about paying over any of the income of the land on this debt after this?

A. I remember at one time after we had sold a great deal of the more productive of the land and the basis for the income was changed from what it was when that lease was made and reduced, the matter came up between us about the income from the place and he remarked—I asked him how much he thought I should pay, he said he would like to get interest on the debt. That was his precise remark to me, and he says, what is the debt, how much is the debt?

A. I told him I didn't know but I paid in a great deal of money there and I didn't know what disposition had been made of it.

Mr. DEAN: Will you state when this conversation was?

A. It occurred in the fall of 1906, I am confident. I can refresh my memory and confirm it on that point, but I am confident that is the case. And I told him I would like to have a statement and he said, you are entitled to it and I will have one made, and two or three days afterwards I asked him for it and he seemed to have forgotten it. He put his hand up to a pigeon hole in his desk and took out one of those debit and credit slips the banks all have and

112 made a memorandum of it. What that memorandum was I didn't know, I understood it to be to remind him of that statement and he says, I will have it for you in two or three days. I asked him again for it after some days and he says, I will have to wait until Mr. Ruby comes up from Oklahoma, he has had charge of that matter while he was here. I was often in the bank and we had various other references to the subject I cannot recall. I remember that in particular, that conversation.

Mr. DEAN: We object to the conversation detailed by the witness with Dr. Wood for the reason that it is incompetent, irrelevant and immaterial and for the reason that Dr. Wood at the time alleged had no interest in this land.

The COURT: Was Dr. Wood admitted at that time to be president of the bank?

Q. What position did Dr. Wood hold at that time?

A. He was president of the bank and in absolute management.

Mr. DEAN: Was that before or after the failure of the bank?

A. The bank failed in December, 1907.

The COURT: Objection will be overruled.

To which ruling the defendants at the time duly excepted and still except (Record 128-131).

Mr. Holden, you testified in regard to these notes mentioned in the agreement having been handed to you in a package by Mr. Moore an officer of the bank?

A. Yes, sir.

113 Q. You remember that testimony?

A. Yes, sir.

Q. I will ask you if at any other time those notes were offered to you after signing these agreements?

A. In the latter part of November, 1904, at the bank at Mr. Patten's desk he offered me the two notes, seventy-two thousand and odd and sixty-two hundred and odd and I refused to receive them. He said at the time he thought they had better keep the note for eighty-two thousand dollars secured by the mortgage. Afterwards, few days afterwards at Judge Robinson's office he offered me the notes again and I declined to receive them. I heard nothing more about them after that until they fell into my hands by Mr. Moore handing me this package (Record 131-132).

In the fall of 1904, witness took steps to obtain the consent of the bank to his making sales of the land in separate tracts. On November 8th he wrote a letter to Mr. Patton who had charge of the matter for the bank. Letter introduced in evidence as Exhibit 23. (Record 134). It is as follows:

Howard M. Holden, 665 Gibraltar Building, 818 Wyandotte St.

Bell Tel. 4281 Main.

KANSAS CITY, MO., *Nov.* 8, 1904.

James A. Patton.

DEAR SIR: The sales of land concerning which I advised you, I agreed to make, but have not gone farther with respect to

114 carrying out the agreement not knowing whether it would be acceptable to the Bank that I should do so. I can, however proceed at once to the carrying of them out if that is what you would like for me to do, and I would very much like to do it. Any sales that I would make, would, of course, be subject to your approval as to price and terms. I would not recommend anything that would not justify approval as you would find on investigation.

I am more than anxious to rapidly liquidate this debt to the bank. The conditions as to the floods and otherwise have retarded progress in this direction. But the conditions are now much improved, and I am satisfied that such progress can be made as will be entirely satisfactory to the bank. As I stated to you the other day, I feel safe in saying that so fast as they can be consummated, I can make sales aggregating at least $25,000 and between now and Jan. 1st at least $20,000 more and that by that date or before, I can repay the bank the interest that it lately paid to the Mutual Benefit and also take care of the 1st of January interest and this year's taxes, and do these

things from other resources than any of the security that is now under pledge. I believe that I can do better than this and that I can make sales to a larger amount, but I do not want to say more than I feel that in any event I can carry out. I also have in hopeful shape a prospect of a transaction of the whole property which would enable me to take up the entire debt. I hope to know more of this tomorrow.

I greatly appreciate the forbearance of the bank in this matter and assure you that I have its interests as well as my own, at heart with respect to it and feel that if the bank will kindly co-operate with me for a further brief time in the liquidation of this business, it will soon be disposed of to its entire satisfaction. No effort of mine will be spared to that end.

Yours truly,

H. M. HOLDEN.

115 Q. At that time were there pending any negotiations by you with prospective purchasers for the sale of any of the land?

A. Yes, sir; there had been all along during the summer and fall in a restricted way as I have said, I think, that the conditions of those agreements limited me to the sale in bulk and for cash, but I departed from that to the extent of having negotiations on hand with several parties for large parts which I thought I might combine together and make it practically operative to the whole of the property or a large part of it.

Q. After writing that letter to Mr. Patton did you have any personal conference with him, any talk with him?

A. Yes, but I can't recall any of the particulars of those talks, I saw him every few days, he came to my office or I was at the bank.

Q. Did you after that have any talk with him with regard to making partial sales of the land?

A. Some time in January, the early part of it I think it was, he stated to me the bank was willing to co-operate with me in making partial sales and that I could go ahead with its concurrence in making such sales, that is the substance of what he said.

Q. Well, then, what did you do after that towards attempting to make sales or making sales?

A. I then, when he gave me that statement, proceeded to actively develop opportunities for selling. Some of these previous opportunities in the fall and summer of 1904 I had lost, parties had changed their minds or had made other investments and the oppor-
116 tunities had passed by, there were several that were still existing and those I availed myself of with the result that several sales were consummated with the same parties. I entered into correspondence with a great many parties and saw agents and embarked on a campaign of making sales. The conditions were really not first-class, we hadn't gotten far enough away from the flood to make a very active market, but during that season, 1905, I made—consummated six sales, they were consummated the tenth of January, 1906. There was great delay in closing them up because the bank had

bought that mortgage from the Mutual Benefit and taken an assignment of it, that was in January, 1905, to Mr. Patton, and Patton died I think in March, and there was some difficulty about getting an administration of his estate, I understood some controversy with his widow I was told, and there was no administrator appointed until I think the following fall, else I would have had several of the sales closed up in the spring of 1905. They all went over until January 10th, I think it was, then they were closed up, six sales.

Q. Who was appointed administrator of the Patton estate?

A. Charles H. Moore, the assistant cashier of the bank.

The COURT: What year did Mr. Patton die?

A. In 1905, I think it was in March, the early part of 1905, and the assignment of that mortgage was January, 1905.

Q. These six sales you speak of you say the contracts made on those sales were closed in 1905?

A. Yes, sir.

117 Q. But the sales themselves were not closed up until 1906?

A. January, 1906.

Q. On account of this delay?

A. Yes, sir; chiefly, well, not all of them, some of the sales were agreed upon in the spring of 1905 and along in the summer and in the fall, one or two of them.

Q. To whom did the administrator assign that Mutual Benefit mortgage?

A. To the National Bank of Commerce of Kansas City.

Q. I want you to give the court somewhat in detail these six different sales you made?

A. I will have to refer to a memorandum.

Q. You have a memorandum of the six sales, have you?

A. Yes, sir. The west half of the S. E. quarter of Section 12, Township 10, Range 13, 80 acres to Joseph Cerny for $2,000; the east half of the S. E. quarter 12-10-13 to Thomas Cerny, $2,000; the S. E. quarter 32-10-14, 160 acres to George Hundertpfund $4,400; the east half of S. E. quarter of 6-11-14 and part of the east half of the N. E. quarter of 7-11-14 north of the railroad, 105 acres to I. H. Mitchell $7,350; part of the S. W. quarter of 6-11-14 and part of the N. W. quarter of 7-11-14, south of the railroad and N. half of S. W. quarter 7-11-14, about 247 acres to A. E. Ensign, $13,565.75; north 120 acres of N. W. quarter of 12-11-13 to G. C. Bills, $6,700.

Q. How much was that altogether, did you add them up—$36,015.75, 792 acres?

A. That is it, yes, sir.

118 Q. Did you have written contracts with these different purchasers, Mr. Holen, or any of them?

A. There were no contracts I remember with Hundertpfund or with Mitchell; they were close neighbors of ours and rested on verbal agreement. Here is the contract with Ensign, there is one with Bills, the others, the two Gerney sales I remember there were contracts but I haven't got them, I don't know where they are, the agent may have kept them.

Mr. GARNETT: I don't care to encumber the record with these contracts only to show they are made in the name of the Holden Land and Live Stock Company, contracts with Bills dated October 14th, 1905, contract with Ensign dated October 28, 1905, that contract was made in the name of Howard M. Holden.

Mr. GARNETT: We will offer these contracts in evidence. (Exhibits C 24 and 25).

* * * * * * *

Q. Was there any written contracts with Cerny?

A. Yes, sir; I remember of seeing those contracts, Mr. Owens attended to it, the sales were made through an agent at Rossville but he did most of the work, hunted up the customers and I saw them up there at the farm and they may be up there now, I never saw them afterwards, they were in his hands, Mr. Owens' hands. Those I know were either in my name or the Holden Land and Live Stock Company.

Q. Mr. Holden, who negotiated these sales with the purchaser?

119 A. Well, by different parties, the Cerny sales as I have said were started by an agent in Rossville, a Mr. Stewart, he was the editor of the paper there.

Mr. SMITH: Whose agent was he?

A. Well, he was my agent I suppose, he was my agent.

Q. In other words, who made arrangements with these agents to sell the land?

A. I did, or Mr. Owens.

Q. Mr. Owens acting under your directions?

A. Yes, sir; he was our manager up there and is still, and he understood I was desiring to make sales of the land and I talked with him fully about it and told him to bestir himself in assisting to bring about sales, and some of these sales, two of them at least, were made without any assistance of any agent.

Q. Who fixed the prices at which these lands were sold?

A. I did in every instance.

Q. In every instance?

A. Yes, sir.

Q. Did any officer or agent of the Interstate Trading Company or the defendant bank have anything to do with making any of these sales?

A. Not the slightest thing.

Q. Did they have any negotiations whatever with any of the purchasers?

A. None whatever; no, sir.

Q. Now, explain to the court, after you had agreed upon the sales with these purchasers, what conference you had then with the bank in regard to the sales?

A. I, in all cases, spoke to the bank regarding sales before I

120 bound myself to them or I don't know as I waited but that I contracted the sales in many instances without saying anything to them but I informed them at least, I regarded them as

mortgagees and I had to have their concurrence in making releases and they were necessary and proper parties to freely confer with regarding the subject, and I always conferred with them, they knew what was going on.

Q. Did they finally concur in all of the sales?

A. Always, there never was any difference between us on the subject, whatever I told them I was doing was assented to by them. They released the mortgage.

Q. Who looked after the closing of these sales?

A. I did entirely.

Q. Who got up the abstract?

A. I did.

Q. Who paid for the abstract?

A. I did out of my own means.

Q. Did any party pay your expenses up here to Topeka in looking after that?

A. Nobody, I paid them myself.

Q. Well, there were some releases to be made when the sales were closed?

A. Yes, sir.

Q. Who paid for recording those releases?

A. I did.

Q. Quit-claim deeds in some cases, were there?

A. Yes, sir.

Q. Who paid for recording those?

A. I did.

Q. Who got up those quit-claim deeds?

A. I did.

121 Q. Who paid all your travelling expenses up here?

A. I did.

Q. And hotel expenses?

A. I did.

Q. Where were these sales closed?

A. Here in Topeka.

Q. Did the bank when these sales were closed send anyone up here to look after their interest in the matter?

A. Sent Mr. Omar E. Robinson to be present and assist in closing up these six sales, but never after that did anybody come—I always closed them alone at the bank at Topeka where I requested in each case the paper should be sent, the bank's part of the papers.

Q. What did Mr. Robinson have to do when he came up here towards closing the sales?

A. Well, he stood around and saw that they were being closed, didn't have very much to do for everything was arranged for in advance and the parties met me here according to appointment and the sales were closed. He either brought the deeds here, the release of the bank and the deed, quit-claim from the bank and the deed from the Interstate Company, the deed, or they were sent here by the bank to the Bank of Topeka, generally they sent them to the Bank of Topeka and whether Mr. Robinson brought them in the case of these six sales or not or whether they were sent to the bank, I don't

remember. The Holden Land & Live Stock Company made quit-claims in all these sales, titles wouldn't have been clear without it.

Q. What kind of deeds did the Interstate Trading Company make?

A. They made warranty deeds generally.

122 Q. What kind of paper did the bank execute?

A. Quit-claims and releases of mortgages, the two mortgages.

Q. Who was charged with the expense of Mr. Robinson's trip up here in closing these sales, if you know?

A. All I know about it is the copy of my collateral account, collateral account of Howard M. Holden on the books of the bank showed a charge of $77.00. I think it was paid him at that time.

Q. Have you a copy of that collateral account you speak of?

A. Yes, sir. (Witness produces paper.)

Q. How did you obtain this Mr. Holden, this copy?

A. After the order of the court for them to show the books to us, you and I went to the bank with Judge Robinson, Judge Robinson made an appointment and we went there and they showed certain ledgers containing this account and we looked the account over on the books, the ledgers and the judge then suggested the bank make a copy for us of that account which the bank did and we went back there in a day or two and received it, checked it off by the ledger, and then they gave us that identical account, statement of it, that is the same paper they delivered to us at the time.

Q. This was delivered to you by the officers of the bank then in pursuance of this order of the court?

A. Yes, sir; delivered to us by the discount clerk who seemed to have charge of the investigation for the bank.

Q. That was under the order of the court requiring them to give us copies of the record?

A. Yes, sir.

123 Mr. GARNETT: We want to offer this collateral account in evidence.

The paper in question was marked Exhibit C-26 by the stenographer and is in words and figures as follows, to-wit:

Collateral Account.

Howard M. Holden.

Date.		Explanation.	Checks.	Deposits.
1905.				
June	9th.	Opening Entry		$743.00
July	1st.	Insurance Deal		150.00
July	12th.	J. W. Rubey	$57.92	
"	15th.	L. P. Hartzell		3,238.50
"	18th.	W. C. Stephenson	15.00	
"	31st.	Interest Jones Anderson		120.00
Aug.	25th.	Taxes to Brown, Shawnee, Kans.	1,537.14	
"	26th.	Note Holden L. & L. S. Co.	2,875.23	
"	27th.	Rental from cattle on pasture		2,040.00
Dec.	21st.	E. O. Robinson acct. Bill	77.00	
"	21st.	Check C. M. Husack		380.92

1906.				
Jan.	2nd.	Sale of corn stalks	.....	300.00
"	3rd.	Cashier's check to F. C. Bowen	1,272.19	
"	8th.		364.12	10,000.00
"	10th.	Land sold to Bills	.....	2,000.00
"	11th.		632.25	500.00
"	11th.		.....	500.00
"	15th.	Check to B'k of Topeka	5.00	6,500.00
"	17th.	Cashier's check to Recorder of Deeds, Shawnee, Kans.	2.00	
"	18th.	Commission on sale of land	135.00	
Jan.	18th.	Sale of Land	.....	4,400.00
	19th.	Check to Topeka	2.55	
Feb.	2nd.	Far. Co-Operative ship	.....	708.79
"	2nd.	Kaw Valley Cereal	.....	493.65
"	8th.	Curney	.....	1,344.00
"	8th.	"	.....	1,344.00
	8th.	Bills' note	.....	4,230.00
	8th.	Ensign	.....	3,030.85
	8th.	Held in Cashier's check by Mr. Rubey	34,996.95	
	12th.	Mitchell	.....	450.00
	12th.	Far. Co-Op. Ship Ass'n	.....	464.57
	13th.	Rec. of Deeds' Check, Mitchell	1.20	
	14th.	Number 698.		
	16th.	Sale of Corn	.....	456.98
	16th.	Taxes	29.78	
	16th.	Notes Interstate Trad. Co.	2,080.41	
		Balance	.....	688.48
			$44,083.74	$44,083.74
	18th.	Balance (overdraft)	688.48	
124				
	19th.	Corn sold to Far. Co-Operative Ship Assn.	.....	557.52
	21st.	1,49330 bu. corn Far. Co. Operative Assn.	.....	484.71
	26th.	Land sold to Geo. Bills	.....	3,579.50
	28th.	Corn sold F. C. Ship A.	.....	226.43
March	7th.	Vandevere	.....	3,340.00
	19th.	Sale of Corn	.....	700.
	5th.	Sale of Land	145.00	1,200.00
March	5th.	Vandevere	.....	187.00
	12th.	Sale of corn	.....	700.00
	22nd.	Commission sale of land to Francis Cockerell	410.00	4,096.80
"	26th.	Sale of corn	.....	300.00
	29th.	Two notes Francis Cockrell	.....	1,001.00
1906.				
Feb.	30.	Applied on	23,096.70	
	30.	Int. St. Trad. Co., Cockerell notes	.....	9,440.00
May	31.	Sale of corn	.....	300.00
	31.	Rebate on Insurance Policy, Shawnee Ins. Co.	.....	3.00
June	16th.	Com.	55.00	2,370.00
		Balance	4,090.78	
			28,485.96	28,485.96
July	2nd.	Balance	.....	4,090.78
	3rd.	Int on John Patton note	3,016.91	
	3rd.	Int. on Int. State note	1,954.59	

Oct.	16th.	Int. on $40,000.00	817.78	
	16th.	" " 75,005.97	1,533.45	
	16th.	Mortgage 150 acres near Leeds	5,246.94	
Dec.	7th.	Rent of 110 for Dec. 1906		8.00
	14th.	Sale of 118		500.00
	14th.	" to Mitchell		500.00
	17th.	Part of 1906 crops Shawnee Co		200.00
	18th.	Part of crops, 1906		500.00
	31st.	Part of crops		253.93
1907.				
Jan.	8th.	Sale of 246 acres Shawnee Co		500.00
	8th.	1906 crops Andrews		405.00
	10th.	Jan. rent on home on Blue River		8.00
	24th.	W. W. Mitchener		1,188.95
	24th.	H. J. Fontaine		1,600.00
	29th.	W. M. Mitchener		4,060.00
Feb.	1st.	No. 181800	511.10	
Feb.	1st.	No. 176230	958.39	
	5th.			300.00
	8th.		45.83	
	9th.		7.50	
	11th.			50.00
	14th.			1,741.25
March	18th.	Cashier's check to Thompson Lumber Co.	66.03	
April	1st.			1,712.50
				9,109.90
				373.15
		Balance	12,942.94	
			27,101.46	27,101.46
April	18th.	Balance		12,942.94
	18th.			13,550.00
		Balance (Statement & Vouchers surrendered April 18, '07	26,492.94	$26,492.94
	18th.	Balance		26,492.94
125				
May	2nd.	Insurance on corn & cribs	41.25	
May	3rd.	Trip of Wheeler to Kingville	5.90	
	4th.		25,201.12	
	29th.	Rebate on Ins. 4,000 bu. corn		15.00
June	4th.	1907 Sale of corn 4,142 bu		1,923.08
	4th.	Expense for loading corn	50.60	
Aug.	26th.	Part of sale of corn		600.00
	27th.	176230	2,548.61	
		118000.		
1907.				
Sept.	9th.	Sale of corn		549.95
	12th.	Far. Co. O		400.86
	21st.			344.59
	26th.	Sale of corn		328.37
	26th.	Rebate on corn		9.00
Oct.	4th.	One car of wheat		472.95
1908.				
		(Statement & vouchers—		
Jan.	28th.	Surrendered to Disct	1,582.96	
		Balance C 11-2-08)	1,706.30	
			$31,136.74	$31,136.74
1908.				
March	28th.	Balance		1,706.30

The WITNESS: That charge of $77.00 paid Mr. Robinson December 21st, it is here, 1905, O. E. Robinson, account bill $77.00.

Q. Mr. Omar Robinson you say represented the bank?

A. Yes, sir.

Q. Did you correspond with him any before closing these sales or about the time of closing the sales?

A. I saw him frequently and wrote him two letters, here, one November 9, and the other January 3rd, November 9, 1905, January 3rd, 1906.

Mr. GARNETT: Before beginning this hearing we notified the defendants to produce these different letters and keep them in the hands of the court, and they are not here, therefore we now offer these copies of letters, Exhibits 27 and 28.

The COURT: Subject to the objection and the production of the originals, they may be offered.

The letters in question were read to the court, and are in words and figures as follows, to-wit:

126 Howard M. Holden, 665 Gibraltar Building, 818 Wyandotte St.

Bell Tel. 4281 Main.

KANSAS CITY, Mo., *Nov.* 9, 1905.

Omar E. Robinson, Esq., Massachusetts Building, City.

DEAR SIR: Subject to the approval of the bank, I have agreed on the following sales in Shawnee County, Kansas:

The east half of the south east quarter of section 12 township 10 range 13 to Thomas Cerny at $25 per acre $2,000, $500 to be paid in cash, $200 on or before three years.

200 on or before four years.

200 on or before four years.

900 on or before six years with interest at six per cent, payable semi-annually.

The west half of the south east quarter of section 12 township 10 range 13 to Joseph Cerny at $25 per acre, $2,000, $500 cash.

$200 on or before three years.

200 on or before four years.

200 on or before five years.

900 on or before six years with interest at six per cent payable semi-annually.

The above two tracts are unimproved prairie detached and two miles north from the extreme north line of the main body of our lands. The proposed buyers are brothers and Bohemians of the best kind, thrifty and industrious and propose to immediately put improvements upon the separate tracts and make homes of them and put the land into cultivation. They can be relied upon to pay very much sooner than the time they take. These lands were ap-

127 praised at $25 per acre by the Mutual Benefit and at $20 by Mr. Stevenson. The above terms were the best that we could

get them to agree to bind themselves to though as I have said, they will be quite sure to pay much faster and will meantime improve the lands and make them more valuable.

Also to George Hundertpfund the south east quarter of section 32 township 10 range 14, 160 acres at $27.50 per acre, $4,400. This is also unimproved. He is to pay $2,000 cash, the balance the privilege of five years though it is likely he will pay more than $2,000 in cash and will be quite sure to pay the remainder before very long. Interest six per cent semi-annually. He is a very reliable German living in the neighborhood and in good circumstances. This was valued at $30 by the Mutual Benefit and by Mr. Stevenson and really should have brought that but $27.50 was all that could be obtained and it was thought best not to lose the chance of a sale.

To Isaac H. Mitchell east half of south east quarter of Section 6 township 11 range 14 and that part of the north east quarter of Section 7 lying south of the above eighty and north of the Union Pacific R. R. about 25 acres—105 acres in all for $6,950 and a balance of indebtedness which I was owing him, amounting to $400. He is to pay $6,100 in cash and the balance about half March 1st, and the other half Sept. 1, 1906. To help to make the cash payment, he has arranged to borrow $4,500 on first mortgage on the place on five years' time. The smaller sum he puts on short time he will be able to pay out of his corn crop of this year and wheat of next year and will want to give a second mortgage for that. He has been on the place as a tenant for a good many years and is thoroughly reliable, sober and capable man and can be relied upon to meet these small payments. About forty acres of this land is upland and the balance bottom land. The Mutual Benefit's valuation on it was $6,700. Mr. Stevenson's about the same but he included with it some other lands. It is a desirable sale and on a strict measurement the
128 quantity would hardly hold out the 105 acres as it extends to the middle of the railroad right of way.

To George C. Bills the north 120 acres of the north west quarter of section 12 township 11 range 13 for $6,700. He is to pay $2,000 on the first of January when he gets his money from a sale of a farm that he had made where he lives in Bates County, Missouri. He wishes to pay $2,000 cash and have the privilege of five years for the balance at six per cent but will at once expend $2,000 on improvements on the land which now has no improvements upon it. With those improvements made, the paper could be readily sold and I am sure that he can be induced to borrow the money after the improvements are made upon the land so improved which he can readily do at five per cent and pay this note. This land was rated by the Mutual Benefit at $60 per acre or $7,200 and by Mr. Stevenson at the same. A sandy belt runs through the center of it from the north to the south and while we endeavored to get more than $6,700 for it, we were quite satisfied to let it go on that account. It includes about all of the sandy land in that section of the farm. We also felt that it was advantageous to get this party who was a good appearing man to come in from the outside and make the purchase. It may lead to others coming in and doing likewise.

To Alton E. Ensign of Jewell County, Kansas, that part of the

south west quarter of section six and that part of the north west quarter of Section 7, lying south of the Union Pacific railroad and the north fractional half of the south west fractional quarter of section 7 all in township 11 range 14 containing 246.65 acres for $13,-565.75—$10,000 to be paid in cash, the balance in a note secured on the land, payable on or before five years from March 1st, 1906, with interest at five per cent per annum payable semi-annually. This party has sold a farm in Jewell County but does not receive a payment therefore until March 2, 1906, but he has arrangements whereby he can obtain the money before that date at eight
129 per cent per annum and I agreed with him that if we desired, the transaction might be closed as soon as the title had been approved by the buyer and the seller was ready to convey, etc., and in that case, each party should bear one half the cost of raising the money for such cash payment, such cost not to exceed eight per cent per annum from the date of closing to March 2nd, 1906. I thought it advisable to get the transaction closed without delay even at the cost of this concession rather than to wait so long as to next March, this being an important sale and lest something might interfere to prevent its being carried out. A very earnest effort was made to get a somewhat higher price for this land. We have held it at $60 per acre which is a little over a thousand dollars more than the price he is to pay and at that it was valued by the Mutual Benefit. In addition to the big flood of 1903, there have been successive floods each year from Cross Creek which has affected this land and the drainage question is a serious one and bound to be a matter of trouble and expense right along in the future. In addition to that along the north line of this tract, the public wagon road runs and then north of that the railroad and to make out 246 acres a measurement has to be taken to the center of the railroad right of way. Mr. Ensign started in by offering $12,000 for this land and stood on that for quite awhile. There is water standing upon considerable of this land. I priced it at $14,400 and finally dropped to $14,000. More than a week elapsed and he finally came up to the above figure and fearing to press the matter farther lest we would lose him entirely, I assented to it. There are no improvements on this land except a small house worth perhaps $250. He will proceed at once to put on some good improvements. This and his coming in as a good thrifty farmer from the outside will help all the other lands that we have there.

These sales are subject to commissions which I believe are 5 per cent on the first $1,000 and 2½ per cent on the balance to
130 parties introducing these people and starting the negotiations though I have done the most of the work myself and in developing the sales at the highest figures obtainable. The sales amount to about $35,500. Add to these the rent money, $10,000 and $1,600 of good secured notes on Jones Anderson makes about $48,000 and taking that off from the total, would leave the balance, I think something under $120,000.

The balance of the lands amounting to 3,961.45 acres at the valuations put upon the same by the Mutual Benefit amount to $164,781.45 and at the valuations by Mr. Stevenson $160,936. In

addition there is the one hundred and ten acres near Kansas City which I value at $33,000 or $300 per acre, so you will see that the bank has a margin of security above the balance after these sales and the rent are allowed for, of $60,000 to $75,000 so its position is a very secure one.

I have other sales in view and expect to make others with the bank's approval so that doubtless by the first of January the balance can be reduced to something inside of $100,000 and perhaps much below that, while at the same time, maintaining the margin of security unimpaired, and my purpose is to continue this work of liquidating persistently until the whole matter is disposed of.

Without attempting to lengthen out this letter to any greater extent, I will show you by maps, etc., the considerations which go to show the advisability of these sales.

Yours truly, H. M. HOLDEN.

P. S.—I talked quite fully in advance with Mr. Rubey regarding all these proposed sales and had his approval and in the last two instances did a little better than what he expected might be done.

Being very familiar with the titles and having a general
131 abstract of the whole property in my possession I am able myself to make up abstracts and have an arrangement with an abstractor at Topeka to examine and certify to same for a moderate charge, thereby saving quite a sum. I will go ahead, if my action meets the bank's approval, and prepare all necessary papers for the closing of the transactions. The abstracts are now out being examined. It will perhaps be a week before anything is ready for closing.

Howard M. Holden, 665 Gibraltar Building, 818 Wyandotte St.

Bell Tel. 4281 Main.

KANSAS CITY, MO., *Jan.* 3, 1906.

Omar E. Robinson, Esq.

DEAR SIR: Herewith please find six warranty deeds from the Inter-State Trading Company to the several parties who have made the purchases of land in Shawnee County, aggregating about $35,000.00.

Also six releases and quit claims The National Bank of Commerce releasing the lands from the mortgages and the lease and quit claiming to the several parties the respective pieces.

I have drawn these papers in form to meet as I understand it, the requirements of the situation. If in any respect in your judgment they should be different they can be changed.

I find at the bank that the Mutual Benefit assigned its mortgage to Jas. A. Patton by an instrument separate from the mortgage itself. Also that Charles H. Moore administrator of the Patton estate has executed an assignment to the National Bank of Commerce. Neither of these assignments have yet been put on record. They should be taken by you to Topeka and filed for record. I am also

sure that the attorneys up there or some of them will demand
132 evidence of Mr. Moore's appointment as administrator. I therefore think it will be necessary to also take to Topeka official evidence of this fact which I suppose will be a copy of his appointment or some other certificate covering the matter, certified to by the clerk of the probate court with his seal attached and this should be put upon record, and thus everything will be clear in making releases in cases of further sales.

These papers that I have drawn up are dated, the older sales October 21st, and the last two December 6th. These dates match the time when the parties might have expected us to be probably ready to close the transactions and I think these dates had better remain unchanged not only in the body of the instruments but in the acknowledgments as well. I suppose of course the notary at the bank will not object to this. It had better be seen to that he does not change the dates in his certificates. I suppose there will be no inconsistency between these dates and the date of his appointment as notary. The advisability of this was made particularly apparent in the case of Mr. Elsign who gave some indications of wanting to get out of the purchase.

Dr. Woods being away, I suppose Mr. Winants will sign as Vice-President. This will require some interlining.

Yours truly, H. M. HOLDEN.

(Record 137 to 163.)

Witness was told by Dr. Woods, the president of the bank, that Omar Robinson had charge of these matters as attorney for the bank and talked fully with Mr. Rubey about the sales that were being made. He was son-in-law of Dr. Woods, and claim agant of the bank. Never talked with any one representing the Inter-State Trading Co. about the sales. At the time these six sales were
133 closed up, the mortgage for $82,000.00 and the Mutual Benefit mortgage then owned by the bank, had not been released (Record 170). The bank executed releases of these mortgages for each separate tract sold, to the purchaser. The releases were executed on behalf of the bank by W. H. Winants, its vice president, who had executed the contract of May 14, 1904, and the extensions thereof, and by authority of the Board of Directors of the bank, as the sworn certificate attached states, and were also signed by W. A. Rule, secretary, who was also cashier of the bank.

The six releases were put in evidence as Exhibits 29 to 34, inclusive. They all contained the same recitals in regard to keeping both the mortgages alive on the unsold land and were identical except as to grantees or property sold. The one from the bank to Ensign, filed for record Jan. 6, 1906, and recorded in Book 314, page 446, is as follows:

Release and Quit-Claim Deed.

National Bank of Commerce, to Alton E. Ensign.
Filed January 6, A. D. 1906, at 11:02 A. M. Recorded in Book 314, page 446.
Acknowledged January 3, 1906, before Horace G. Craig, Jr., N. P., Jackson Co., Mo.

Whereas, the Holden Land & Live Stock Company executed its mortgage to The Mutual Benefit Life Insurance Company on June 6, 1901, upon that part of the southwest fractional quarter of Section six (6) and of the northwest fractional quarter of Section seven (7) lying south of the Union Pacific Railroad, and all of the north fractional half of the southwest fractional quarter of Section seven (7), all in Township eleven (11) south of Range fourteen (14),
134 east of the 6th P. M., and other lands, all in Shawnee County, Kansas, which mortgage was filed for record June 7, 1901, and recorded in Vol. 276, at page 473 of the records of Shawnee County, Kansas, and

Whereas, said mortgage was by said Insurance Company subsequently assigned to James A. Patton, and thereafter was by the administrator of the estate of said James A. Patton, deceased, assigned to The National Bank of Commerce of Kansas City, Missouri, and

Whereas, the said Holden Land & Live Stock Company executed its mortgage to Howard M. Holden on said lands on July 1, 1901, which mortgage was filed for record July 2, 1901, and recorded in Vol. 284, at page 126 of the records of Shawnee County, Kansas, and

Whereas, said last named mortgage was subsequently assigned by said Holden to the said The National Bank of Commerce of Kansas City, Missouri, and

Whereas, on February 16, 1905, the said The National Bank of Commerce of Kansas City, Missouri, executed its lease to said premises to The Holden Land & Live Stock Company, which lease was recorded March 8, 1905, in Vol. 314, at page 3 of the records of Shawnee County, Kansas, and

Whereas, the lands above first described have been purchased by Alton E. Ensign, of Jewell County, Kansas,

Now, in consideration of one ($1.00) dollar to it in hand paid, and of other valuable considerations, the said The National Bank of Commerce of Kansas City, Missouri, does hereby release from the lien and effect of both the aforesaid mortgages, and from all claims and obligations under said lease, and does hereby remise, release and forever quit-claim unto the said Alton E. Ensign, his heirs and assigns, the said part of the southwest fractional quarter of Section six (6) and of the northwest fractional quarter of Section seven (7) lying south of the Union Pacific Railroad, and all of the north fractional half of the southwest fractional quarter of Section
135 seven (7), all in Township eleven (11) south of Range fourteen (14) east of the 6 P. M. in Shawnee County, Kansas, said mortgages and said lease, however, to remain in full force and effect as to all the other lands described therein.

In witness whereof, The said The National Bank of Commerce of

Kansas City, Missouri, has caused this instrument to be signed by its vice president and attested by its corporate seal this 6th day of December, 1905.

[SEAL.] THE NATIONAL BANK OF COMMERCE OF KANSAS CITY, MO.,
By W. H. WINANTS, *Vice-President.*
W. A. RULE, *Sec'y.*

STATE OF MISSOURI,
County of Jackson, ss:

On this 3rd day of January, 1906, before me appeared W. H. Winants, to me personally known, who being by me duly sworn, did say that he is the Vice President of The National Bank of Commerce of Kansas City, Missouri, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said W. H. Winants acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof, I hereunto subscribe my name and affix my Notarial seal at my office in Kansas City, Missouri, the day and year last above written.

[SEAL.] HORACE G. CRAIG, JR.,
Notary Public Within and for Jackson County, Missouri.

My commission expires September 5, 1906 (Record 171 to 175).

Q. Now, Mr. Holden, I want you to tell the court what was done with the proceeds of those six sales, you may go on and detail them?

A. The sale of 80 acres to Joseph Cerny, $2,000, after al-
136 lowing $75 commission, $1,925 went to the bank; of that $1,500 were in purchase money notes, secured back on the land. The sale of 80 acres to Thomas Cerny, $2,000, less $75 commission, $1,925 net went to the bank; of that $1,500 were in notes secured back on the land. The sale to Hundertpfund, $4,400, less $135 commission, $4,265 net went to the bank. That was all in cash. The sale to Mitchell, 105 acres, $6,950, less $198.75 commission, $6,751.25 net went to the bank; of that $450 was in a note secured on the land. The sale to Ensign, 247 acres about, $13,565.75, less $364.12 commission, net $13,201.63 went to the bank. Of that $3,565.75 was in a note secured on the land. The 120 acres sold to Bills, $6,700, $192.50 commission out, $6,507.50 net went to the bank, of which $4,700 was in a note secured back on the land.

Q. Now speaking of this Mitchell sale, you said that $6,950 of that sale went to the bank and he paid $7,350 for the land; how is the difference accounted for there?

A. Well, the consideration was $7,350 in the deed and that was the amount he paid for it, but I owed him $400, had for some little time, and that was taken out and the balance, $6,950, was what the bank got out of it, less a commission. That was understood by the bank at the time

Q. You say that was a personal debt of yours of $400?
A. Yes, sir.
Q. That is, you owed Mitchell?
A. I owed Mitchell.

Q. Did the bank know at the time you kept out $400?
137 A. It did. I spoke to the bank about it beforehand and it was stated in that letter to Mr. Omar Robinson which I read, and the consideration of the deed of the Inter-State Company was $7,350. The bank never called on witness to pay to it that $400. Never was employed by the bank nor by the Inter-State Co. to make these sales.

After closing these sales, continued to negotiate other sales. Had great amount of correspondence and listed the property with agents.

A. I guess about every agent in Topeka and then others acting up there like the editor of the paper at Rossville, we opened the door wide and told everybody that spoke to us about them—some of the farmers around there, that we would pay them commission for any sales they were instrumental in making and bringing customers to us. We didn't care whether they were agents or not, no difference.

Q. When was the next sale made of any of the property?
A. Next sale was February 23rd, 1906, that is, that is when it was closed. It was made before that some little time, I cannot tell you exactly. That was to Mr. George C. Bills of the west half of the southwest quarter of Section 1-11-13 south of the railroad, 68 8-10 acres for $3,700.00. That was the next one.
Q. Who negotiated that sale?
A. George M. Noble & Co. here at Topeka.
Q. Who fixed the terms of the sale with the purchaser?

A. I don't recollect. He communicated an offer and we
138 had a price upon it, we had fixed prices on all the property and some cases we got that price and some cases we made concessions because of the condition of the particular land under consideration. Had quite a struggle over that sale I remember to get our price. The land had been affected by the waters of Cross Creek.

Q. Did you have any part in the negotiations personally with Mr. Bills in making the sale?
A. Yes, sir; considerable.
Q. Well, what was done with the proceeds of that sale?
A. After paying $120.50 commission the balance, $3,579.50, went to the bank in cash.
Q. To whom was that commission paid?
A. George M. Noble & Co.
Q. When did you make the next sale, when did you close the next sale?
A. To A. Vandivere, north half, southwest quarter 12-11-13, 80 acres for $4,800.
Q. Who negotiated that sale, Mr. Holden?
A. An agent at Rossville by the name of McQuary. A. A. McQuary.
Q. Did you personally have any part in negotiating the matter, in closing the sale?

A. I did like I did in all the cases, the agents would be indifferent to a considerable extent about just what we got for the property just so that they got the sale through and got their commission. I always stood out for what I thought ought to be fair in the case. None of the cases where it wasn't handled very largely by myself or Mr. Owens for me in addition to what the agent did.

139 Q. Was that a cash sale?

A. No, sir; $145 commission out, $4,655. He paid $1,200 in cash and gave $3,600 in notes; proceeds went to the bank.

A. The next sale was closed March 21st, 1906, south half of southwest quarter of 7-11-14, 78 75-100 acres of F. J. Cockrell, for $5,000, commission $125.00, leaving $4,875.00 net which went to the bank. Of that $3,500.00 were notes secured back on the land. On the same date the northeast quarter of 12-11-13, 160 acres to E. M. Cockrell, for $10,400.00 $285.00 commission, net amount $10,115.00 which went to the bank. $7,800.00 of that were notes secured back on the land.

Q. The next sale?

A. The next sale was closed on June 11, 1906, south 40 acres of the northwest quarter of 12-11-13, to James Devinney for $2,400.00, less commission paid $85.00 net $2,315.00 in cash which went to the bank. The next sale was closed January, 1907, haven't got the exact date on this statement. The north half of the southeast quarter of 12-11-13, 80 acres to W. M. Mitchner for $6,000.00 Out of that came $175.00 commission and $134.55 which I owed him for seed wheat. The net amount less those two items $5,690.45 went to the bank, of which $4,000.00 were notes secured on the land. The next sale was closed March 7th—east half of the southwest quarter of 1-11-13 south of the railroad 52 9-10 acres to H. J. La Fontaine for $3,174.00 less commission $104.35 net $3,069.65 in cash went to the bank. On the same date east half of 1-11-13 fractional

140 and less the railroad right of way, about 290 acres, sold to La Fontaine for $11,990.00 less commission $349.55 net $11,640.25. That amount went to the bank and $3,500.00 of it was in a note given in part payment, secured back on the land. March 9, 1907, sale was closed to J. C. McCoid for $4,400.00 southwest quarter 32-10-14, 160 acres $4,400.00, commission off $135.00, net $4,265.00 which went to the bank, of which $3,300.00 were in notes secured on the land. On the same date to the same party, McCoid, sale was closed of the N. W. fractional quarter and west half of the N. E. quarter and N. E. quarter of the southwest quarter and one acre in the south half of the southwest quarter of 5-11-14, 246.62 acres for $7,000.00 less commission $200.00, $6,800.00 net which went to the bank, of which $5,250.00 were notes secured on the land. March 26, 1907, sale was closed to——

The COURT: When was this suit commenced?

Mr. GARNETT: Commenced in 1908.

A. (Continuing:) These sales from Mitchner down were 1907. March 26th, the east half of the southwest quarter of 12-10-13, 80 acres was closed to C. C. Bradley for $2,000.00 less commission $75.00 left $1,925.00 which went to the bank, of which $1,500.00

were in notes secured on the land. Those were all the sales that were closed before the bank closed (Record 197 to 204).

Witness is asked to state total amount of these last sales and he further testifies as follows (Record 206 to 214):

$93,505.23 the amount that went to the bank out of these last sales with the six sales, in cash and in notes.

141 Q. Mr. Holden, in the sales to McCoid was there any land included in that not covered by the mortgages in controversy?

A. Yes, sir, there was one acre.

Q. Have you a map of this land showing the situation of that acre (witness produces map)?

Q. Who owned that acre at the time?

A. I owned it personally.

Q. Now, I want you to explain to the court the character of that acre?

A. I think this map will assist in it. This is all upland here (indicating) 245.62 acres in this and it is entirely destitute of water, pasture land. The bluff line comes along about like that through the country. That is bottom land down here and this upland (indicating). Now, I formerly owned that 80 acres down to the south of this and I sold it to one Conrad Meyer, away back in the eighties sometime, and reserved that one acre because it had upon it a magnificent spring, one of the finest in the whole country up there and this land adjacent to it being totally without water required that spring for any pasture purposes and hence I reserved it. Afterwards when the Holden Company was organized and the land was transferred by me to the Holden Company, I suppose I overlooked that acre, at least it was not transferred with the rest of the property, and it was never included in the mortgage to the Mutual Benefit or the mortgage that came to the bank or in the deed to the Inter-State Trading Company. It stood in my name.

Q. Was there any incumbrance on it?

A. No, sir; none whatever. When Mr. McCoid came to buy that land he also bought a hundred and sixty right north of it which had no water on it. When he came to buy it, of course he would not have bought it, he wanted it for pasture purposes of sheep

142 only, now without that spring going in I understood that this land wasn't marketable for any such price it ought to bring with that spring and I put it in, that acre. Myself and wife made a deed to it.

Q. McCoid the purchaser?

A. Yes, sir, made it 246.62 acres. He bought that acre and the pay for the whole of it went to the bank.

Q. What was that acre with the spring on it worth to the main tract of land in your opinion?

A. I should think that a $1,000.00 would not be an over valuation of it considering its connection with all the other lands round about it without any water upon them. It was only an acre of land, but the spring gave value to all the rest of the land it connected with.

Q. Did you say anything to any of the officers of the bank about that acre at the time?

A. Yes, when we were making that sale I spoke of this acre on the outside that was not in the deed or mortgage.

Mr. ROBINSON: We object to that unless he tells to whom he spoke as representing the bank as being a conclusion of his (no ruling).

A. (Continuing:) But that it was included in the transaction.

Q. Do you remember who you spoke to about that, what officer of the bank?

A. I think Dr. Woods, my conversations at the bank were always with Dr. Woods or Mr. Rubey or whoever stood in Mr. Rubey's place.

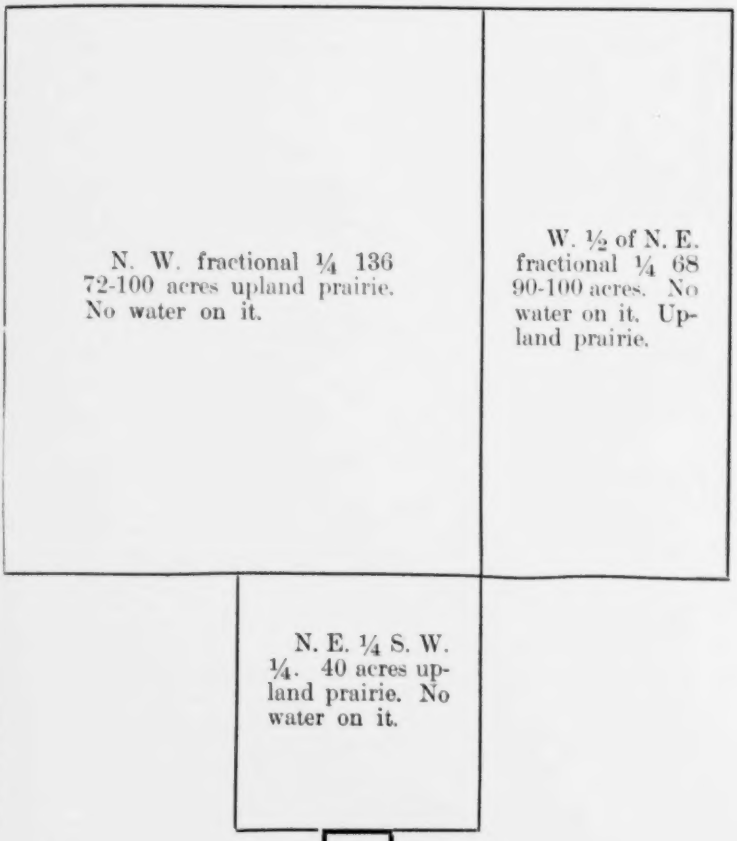
Q. Out of that sale did you reserve any money for that acre of ground?

A. No, sir; did not.

Mr. GARNETT: We want to introduce this plat in connection with his testimony.

The paper in question was marked Exhibit C-35 by the stenographer, and is hereto attached and made a part of this record.

143 *Lands in Section* 5, *T.* 11, *R.* 14, 246 62-100 *Acres, Sold J. C. McCoid in March,* 1907, *for* $7,000.


N. W. fractional ¼ 136 72-100 acres upland prairie. No water on it.
W. ½ of N. E. fractional ¼ 68 90-100 acres. No water on it. Upland prairie.
N. E. ¼ S. W. ¼. 40 acres upland prairie. No water on it.
1

acre in S. ½ of S. W. ¼ reserved by H. M. Holden, when he sold the balance of the S. ½ of S. W. ¼ to Conrad Meyer, May 7th, 1890, for $3,950 for the other 79 acres which was bottom land. The bluff line runs east and west through the north edge of this reserved acre and out of it runs a large unfailing spring of fine water, which is the only supply for the 245 62/100 acres of pasture land on the north, and to which it is of great value.

The title to this acre, without which Mr. McCoid would not have bought, always remained in H. M. Holden, unincumbered and with no claim of the bank upon it, but Holden let it go in with the rest and the bank got the proceeds.

144 Q. In the sale to Mitchner you spoke of $134.55 being reserved by him which you owed him for seed wheat, you took that much out of the sale?

A. Yes, sir.

Q. Was that done with the consent of Dr. Woods and the bank?

A. Yes, I remember of speaking to Dr. Woods about that himself.

Q. Now, in closing up these sales, Mr. Holden, who prepared the abstract of title?

A. I did in the same way that I testified I did as to the six sales preceding, sent them up here, took the abstracts up here and had them checked over and certified by the abstractors here at Topeka.

Q. Did the bank or the Inter-State Trading offer to pay any part of that expense?

A. No, sir; I paid them entirely from my own funds.

Q. What other expense from your own funds did you pay in making these sales?

A. All expenses attached to them regarding surveys, some cases had to have the corners established, in one or two cases the land, the diagonal tract along the railroad re-surveyed and the recording fees and telephone bills and telegraph, hotel expenses, railroad fare and everything else that had to be done to carry the sales through to a consummation. I paid all recording fees excepting in two or three cases I see in my collateral account the bank furnished, charges of $2.00 and some certain sums which were in instances where the mortgages for the time part of the payment were left behind

145 in the Bank of Topeka to have recorded and they recorded them and paid the fees and reported that I suppose to the bank, and the bank charged my account. The collateral account shows their notation.

Q. Who prepared the papers when you went to close the sales, such as the deeds and mortgages?

A. I did in every case, notes and mortgages, deeds for the bank, for the Inter-State Company to execute and releases and quit claims to the bank and quit claims from the Holden Company, what other papers there were; frequently attorneys would be critical and object to parts that previous attorneys hadn't objected to and I would have to get affidavits from parties covering certain points and such things.

Q. Did the bank have any representative here at all when you went to close these last sales?

A. No, none after that first time when Mr. Omar Robinson was here.

Q. Did the bank ever offer to pay any of these expenses?

Mr. ROBINSON: We object to the question as calling for immaterial testimony, it hasn't been shown he demanded them from the bank.

The COURT: Objection overruled.

To which ruling the defendants at the time duly excepted and still except.

A. Never.

Q. Did the bank know you was paying out these expenses?
A. It certainly did, I never rendered them any account, I spoke of them being paid at times.
146 Q. Ever ask the bank to pay them?
A. No, never did, thought it was my business to be paying them.

Contracts of sales to the different purchasers introduced in evidence. They were all made in name of Holden Land and Live Stock Company as sellers. Commissions paid to agents through whom sales were made, as stated. Had no contract with the Inter-State Trading Company or with the bank or any arrangement with them whereby witness was to receive any commissions for making the sales. "I had no intention or purpose of realizing any commission on them" (Record 215 to 234).

A. Where the agents were right here on the spot at the time of the closing, some instances of that kind it was paid right direct to the agent. Where they were not I would receive it perhaps and send it to them, account to them. It got into their hands anyway, and in quite a number of cases the whole returns were sent to the bank and without the commission, and the bank paid me the commission down there for disposition as the occasion required.

Mr. ROBINSON: We move to strike out the last part of the answer as a conclusion.
The COURT: Motion overruled.
To which ruling the defendants at the time duly excepted and still except.

A. (Continuing:) What I meant was, I was under obligations to pay it.
147 Q. I want you to explain to the court the policy pursued by you in making sales of land there in regard to what was left, in taking care of the property generally?
A. We had a sort of standard, the estimate of value by the Mutual Benefit Life Insurance Company, but conditions changed more or less, some of the tracts were worth more money and some by reason of the effect of the high water had fallen a little below perhaps. I exercised my own judgment and thorough knowledge of every bit of the land and consultation with Mr. Owens and insisted always upon getting the highest price we could obtain and yet make sales. We always got pretty fair prices, I was careful also to not allow the land to be cut up and sold in such parcels as would have damaged the adjacent tracts that might readily be the case if I didn't exercise care over it. I don't remember whether your question covered anything more than I have answered or not.
Q. On these last sales what did the bank have to do with negotiating these last sales, if anything?
A. Nothing whatever, except to receive the proceeds.
Q. Did the Inter-State Trading Company have anything to do with them?
A. Nothing.

Mr. ROBINSON: You don't mean to say you know what the bank did with the money?

A. No.

Q. Now, I will ask you if you directed the application of the proceeds of these sales to any particular fund?

A. Never did.

148 Q. Did the bank at the time these moneys were turned over to it, inform you in what way the proceeds of these sales were being applied?

A. Did not.

Q. You spoke of some deferred payments on some of these sales secured by deeds of trust on the land, what interest were those deferred payments drawing?

A. They all drew 6 per cent, excepting that note of three thousand odd dollars of Ensign's, that drew 5 per cent and interest was payable semi-annually on all the paper except Vandivere's which was annual.

Q. Do you know what the bank did with those notes?

A. Only from the disclosures of that collateral account and that shows——

Mr. ROBINSON: We object to his stating what that shows (no ruling).

Q. You received that collateral account since this suit was brought?

A. Yes, received it right from the hands of the bank as you know.

Q. Now, I want you to take that collateral account and see if you can find the notes we have been speaking of, the description of them and the disposition made of them?

Mr. ROBINSON: I think that would be the best evidence if it is in evidence.

The COURT: I think Mr. Holden may explain, give his version of what the account shows.

To which ruling the defendants at the time duly excepted and still except.

149 A. That is the original document made by the bank and furnished to us by the bank. On the Ensign sale as I have already shown, there was a note taken for $3,565.75——

Mr. ROBINSON: We object to that as the note is the best evidence.

The COURT: Objection overruled.

To which ruling the defendants at the time duly excepted and still except.

A. (Continuing:) That was five years at 5 per cent. The bank gave us credit here in that collateral account on February 8, 1906, for $3,030.85 which shows they discounted that note $534.90, and by a calculation, which I have made and anybody can follow and see is correct, they realized over 8½ per cent interest compounded semi-annually.

Mr. ROBINSON: We object to that as his conclusion (no ruling).

Q. Mr. Holden, you have been in the banking business a number of years and are an expert accountant?

A. I don't claim to be, I know how to figure interest.

Q. You took the data from that collateral account on which you got the credit and the amount?

A. Yes, sir; here is a complete computation of each one of these notes where they have been discounted. Now, there is a credit here on the same date, February 8, 1906, Bills' note it says in the collateral account, Bills' note $4,230.00, that note was for $4,700.00.

Mr. ROBINSON: We object to that as not the best evidence.

150 The COURT: Overruled. To which ruling the defendants at the time duly excepted and still except.

A. (Continuing:) Showing the bank discounted the note $470.00 by which it realized over 8½ per cent interest compounded semi-annually and $53.82 besides. In the case of the Cernys two of them, they each gave notes for $1,500.00 secured on the land and the collateral account shows on the same date, February 8, 1906, two credits for $1,344.00 each, showing the bank discounted them $156.00 on each of them and that enabled the bank to realize over 9 per cent interest per annum compounded semi-annually on each of those with an excess of $14.10 each.

The COURT: Mr. Holden, do you know what disposition the bank made of those notes after it received them?

A. I don't, kept them presumably if they are in the banking business discounting paper. I only know they gave me credit for these amounts.

Q. You only know that from the collateral account they kept against you, they furnished you?

A. That is it, I didn't know these facts until they furnished this collateral account. The Vandivere note, Vandivere gave notes for $3,600.00 and the bank credited for those on March 7, 1906, $3,340.00, making a discount of $260.00 and that realized for the bank 8½ per cent, a little over 8½ per cent interest compounded annually. The Cockrell note, those amounts, the two Cockrells, husband and wife, $11,300.00 of notes given in the sale and the bank credited for those $10,441.00 showing a discount of $859.00 on those notes and realized $69.82 in excess of 8 per cent interest per annum compounded semi-annually. These are all the notes I see entered here in the collateral account.

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Mr. ROBINSON: I move to strike out the answer as being a conclusion of the witness, and not the best evidence and immaterial.

The COURT: Overruled. To which ruling the defendants at the time duly excepted and still except.

A. (Continuing:) I have made a computation here with much care in each case and I am sure it is accurate.

Mr. GARNETT: We offer that in evidence (Ex. C 41).

Q. Mr. Holden, without taking up these notes in detail, I will ask you with regard to the security back of these notes, whether it was good or whether it was bad?

A. First class, the Ensign note he paid thirteen thousand five or six hundred dollars, and he paid ten thousand cash and gave a note and they were all strong, I was careful in making sales to make sure of getting enough cash paid to insure the sale being carried out.

Mr. ROBINSON: You refer to the purchase money notes you turned over?

A. Yes, sir.

Q. Realized from the sale of these various tracts of land described?

A. Yes, sir (Record 234 to 253).

Outside of moneys received by the bank from their sales, "I put in between Oct. 15, 1905, and Oct. 2, 1907, $14,432.30 from
152 other sources than the sales of land. All these amounts appear credited to me in the collateral account. I checked it over." Most of it was from the outcome of crops up there. In addition to amounts paid by witness, the bank received $250 for rent of Jackson County land which I do not see credited (Rec. 254).

Copies of many hundred letters written by Mr. Holden and original letters received by him from numerous parties in 1905-1906 & 1907, relating to proposed sales of land and to the sales that were made; to and from agents, abstractors and attorneys examining titles; about drainage matters, the care of the property and subjects pertaining to it were offered in evidence.

Witness produces receipts $171.40 paid out by him for abstracts of titles to lands sold. Also bills for typewriting and telephones. We kept a typewriter employed about half the time in these matters for which expenses is not included in these bills (Rec. 318-333). Vouchers introduced for $25.85 paid county surveyor for making surveys.

Q. What was the occasion for that?

A. As I was saying, we had to find the corners. In this Cockrell case, perhaps some others and in another case the tract of land on the south of the railroad—the railroad runs diagonally northwest through our land and a tract of bottom land, whether by a previous survey I don't know who by, some surveyor, was given at 50 acres in that tract, and when we sold that tract, that is in Section 1, we had sold the northeast quarter of Section 12 and the land adjacent
153 to it on the south to Mr. Cockrell, and in ascertaining the corner, at that survey it drew Mr. Owen's attention to the apparent error in the survey of the tract lying north of it up to the railroad. He called my attention to it and we took chains and measured it off as best we could and that confirmed his suspicion. We then had it resurveyed and found it contained 66 and ½ acres. I think it was, so by that very act of his we sold that at $60.00 an acre and we gained sixteen and a fraction acres, 16 and ½ acres made by that survey. In other words we would have sold that land at 50 acres relying on the old survey as being accurate. There was nothing to call our attention to the matter previous because we owned all the land, it

was just in one field and when we came to cut it up we came on to that error and it amounted to a difference in price of $990.00 I remember, which might have been lost except for that care. We sold that to Mr. La Fontaine at 66 and ½ acres.

Q. Have you any other vouchers now relating to these expenditures?

A. Here is $28.70 recording fees paid by me in connection with these sales, received by the register of deeds.

Tax receipts for 1906 paid by witness amounting to $367.46 on Kansas lands offered in evidence (Record, 337 Ex. C 55).

The WITNESS: Here are two bills for costs in cases in our district court here, one No. 23349, Holden Land and Live Stock Co. against R. H. Herrington, the other 21622 Herrington against Holden.

154 That was in connection with some contest over drainage matters up there which very seriously affected our land, and we lost in the cases and here is $165.50 costs that were a judgment against us and against the land, and before those six sales made in 1905, could be consummated with a clear title, these costs had to be paid and I paid them Dec. 29, 1905, $165.50. The bills were offered in evidence (Ex. C. 56), Record 345).

These bills amount to $791.26 paid entirely from witness' own funds. The bank knew that he was paying them and never offered to reimburse him (Record 349).

Bill for $45 for repairing scales paid by witness, offered in evidence, also bills for grass seed paid by witness in 1905-1906 & 1907—$149.45 for permanent improvement of lands that were in a depleted condition (Record 387-389).

Q. Did you pay out any money in repairing houses and dams and barn, digging ditches and things of that sort?

A. Yes, sir; the most of such expenditures were made by Mr. Owens to whom I sent money from time to time to provide for such wants. I have here a list of the expenditures of that class amounting to $884.23, itemized in the statement, each item numbered and the voucher for it numbered and the character of the expenditure designated, what it was for, whether it was for improvements, for repairs of building, work on the dam, various drainage courses, construction of dam and river bank protection, such matters and things, there are twenty-two different items mentioned.

Q. During what year were those payments made?

155 A. 1904, '5, '6 and '7. The first item is our share of cost of first Wagner dam to prevent flooding of our land, paid to S. J. Oliver, chairman of committee, as evidenced by check on Rossville State Bank payable to and endorsed by Oliver, dated May 21st, 1904, amount $52.68. The next item is: Paint brushes, linseed oil and paint used in painting the two dwelling houses, etc., $55.13. There is a bill July 20th, 1906, for second Wagner dam, that is our share, $122.92.

Mr. GARNETT: We offer in evidence this itemized statement in connection with the vouchers (Record 393).

Mr. DEAN: We object to the offer as being incompetent, irrelevant and immaterial and not tending to prove any issue.

The COURT: Objection overruled for the present.

To which ruling the defendants at the time duly excepted and still except.

Plaintiffs offer in evidence letters written by witness in connection with the management of the farm (Record 422-423).

Mr. DEAN: All the balance of these letters we object to because they simply constitute statements made by Mr. Holden to his personal correspondent, and not to the knowledge so far as shown of any of the defendants, and as constituting if anything, self-serving declaration, and as incompetent, irrelevant and immaterial.

Mr. GARNETT: The letters are not offered in evidence for the purpose of proving any statements made in the letters, but
156 simply for the purpose of showing the amount of effort put forth by the plaintiff, Mr. Holden, in making sales of the land and as a part of the transactions leading up to these sales, and for the purpose of showing in connection with the other exhibits not passed on, the immense amount of detail, labor and work expended by this plaintiff calling for the constant employment of a stenographer in looking after the land in controversy.

The COURT: Do you claim that as a basis for a charge?

Mr. GARNETT: No, sir; not to make a charge, but simply to show the claim of ownership. In other words it shows the plaintiffs in this case, in correspondence and otherwise treated that land as belonging to them, treating the defendants simply as mortgagees of an unpaid debt.

The COURT: It seems to me very clear these letters are not competent. The fact that Mr. Holden representing the company and himself had correspondence, the mere fact that he had correspondence and that he made claims of ownership, has been abundantly shown, but how the letters themselves will prove that, I fail to see, that is, how they would be competent for any purpose. The objection will be sustained.

Mortgage of Holden Land and Live Stock Co., to Mutual Benefit Life Insurance Co. offered in evidence (Ex. C. 63). Also note secured by said mortgage, which note is in words and figures as follows (Ex. C. 64);

First mortgage note negotiated by Bartlett Brothers $90,000. Topeka, Kansas, June 6th, 1901. On the first day of July, 1906,
157 for value received, we promise to pay to the Mutual Benefit Life Insurance Company, or order, Ninety Thousand Dollars, with interest thereon, from July 1, 1901, at the rate of five per cent per annum, payable semi-annually, according to the tenor and effect of the interest coupons hereto attached and bearing even date herewith; both principal and interest payable at the office of said company in Newark, New Jersey.

The principal sum of this note and any unpaid interest coupon, shall bear interest after the same becomes due and payable, at the rate of ten per cent per annum until paid; and it is expressly agreed that if default be made in the payment of any interest

coupon, or in case of a failure to perform any of the covenants contained in the mortgage securing this note, then at the option of the legal holder hereof, the said principal sum, with the interest due and accrued thereon, shall become at once due and payable, without notice and may be collected immediately, anything herein contained to the contrary notwithstanding. This note is given for an actual loan of the above amount, and is secured by a mortgage of even date herewith, which is a first lien upon the property therein described.

It is understood and agreed that the sum of one hundred dollars, or any multiple thereof, may be paid on account of the principal of this note at the maturity of any interest coupon after one year from the date hereof.

Revenue stamps to the amount of $44.50 are affixed to the mortgage accompanying this instrument, as required by law.

Attest:
HALE HOLDEN, *Secretary.*

HOLDEN LAND AND LIVE STOCK COMPANY.
By HOWARD M. HOLDEN,
President.

[SEAL.] HOWARD M. HOLDEN.

Interest Coupon.

$2,250.00. JUNE 6TH, 1901.

On the first day of July, 1906, we promise to pay to the Mutual Benefit Life Insurance Company, or order, Twenty-two Hundred Fifty Dollars, at its office in Newark, New Jersey, for interest on a principal note of $90,000. This note bears interest at the
158 rate of ten per cent per annum after due.

HOLDEN LAND AND LIVE STOCK COMPANY,
By HOWARD M. HOLDEN,
President.

Attest:
HALE HOLDEN, *Secretary.*

HOWARD M. HOLDEN.

Without recourse.

JAMES A. PATTON,
By CHAS. H. MOORE,
Administrator.

Pay to the order of James A. Patton of Kansas City, Mo., without recourse.

THE MUTUAL BENEFIT LIFE INS. CO.

Reduced to $2,175. Reduced to $2,125. Reduced to $1,925. Reduced to $1,825. (Seal.)

Three other interest coupon notes attached precisely like the foregoing including endorsements, excepting that they are respectively payable on the first day of January, 1906, July, 1905, and January, 1905.

The said principal note bears the following endorsements:
July 24, 1902, $3,000 pd. ap. principal, and $10 int. on same.
Apr. 14, 1903, $2,000 pd. ap. prin. and $28.88 int. on same.
April 18, 1903, $8,000 pd. ap. prin. and $120 int. on same.
June 1, 1903, $2,000 pd. ap. prin. and $41.37 int. on same.
Feb. 4, 1904, $2,000 pd. ap. prin.
May 17, 1904, $9.16 pd. for int. on prin. payt. of 2-4-04.'
Also endorsement to Patton and by Patton's administrator, same as coupon notes.

The mortgage securing above note was dated June 6, 1901. Holden Land & Live Stock Co. to said Insurance Co., a corporation under the laws of New Jersey, located at Newark, N. J. Filed for record in Shawnee County, Kan., June 7, 1901. Recorded book 276, at mort. p. 473.

Conveys the lands located in Shawnee County, Kan. described in deed of May 12, 1904, to Inter-State Trading Co. and the lands that had previously been sold in all 5603.44 acres.

159 "To have and to hold the same with the appurtenances * * * and unto second party, its successors and assigns forever; the intention being to convey an absolute title in fee to said premises." Said Holden Co. covenants that it is lawfully seized * * * has good right to convey, that said premises are free of incumbrances and that it will warrant and defend, etc.

Provided that if first party shall pay said notes and perform all covenants, etc., this mortgage to be void, otherwise to remain in full force. Said first party agrees to pay the principal sum and interest with costs of collection any costs, charges or attorney's fees incurred and paid out by second party in maintaining priority of this mortgage; also to pay all taxes, to abstain from commission of waste, to keep buildings in good repair and insured for $15,000 and to assign and deliver all policies to said Ins. Co.; in case of failure to do so, second party may pay taxes make repairs or effect such insurance and amount paid therefor with interest at ten per cent, shall be collectible in same manner as principal sum. Said first party agrees that at any time after default in any payment or performance of any covenants, second party may declare entire debt due and payable and thereupon second party shall be entitled to possession and may proceed to foreclose and in case of foreclosure, the judgment shall provide that the whole of said premises be sold together and not in parcels.

In witness whereof, etc.

Said mortgage was acknowledged on June 6, 1901, before Garrett Ellison, Notary Public in and for Jackson County, Missouri.

Witness explains what he did in regard to protecting the property by looking after drainage.

The WITNESS: There are a number of very serious water questions up there. Here (indicating) is the river, there is one
160 south of the river, the water would get high and when the water got high it would run through there and flood this land. Here is a depression marking the boundary between the

upper bench and lower bench. There never was any water on it until 1903. There is a natural bank along the river that is higher than the land back of it. In the flood of 1903 that was washed down and made a secondary river running through there about twelve feet deep or more, right up against our main house and we were greatly troubled about that. It overflowed a great deal of the land on that side. We put in a dam in the fall of 1904——

Mr. DEAN: What time in the fall?

A. Well, we put in one before that, we didn't suppose there would ever be another flood again, and so we put in a dam that would be sufficient we thought to keep the water from running through there.

Mr. DEAN: When was that done?

A. Well, then when the flood of 1904 came it was much less, but that washed out and in the fall of 1904 we joined in with others and put in another dam in there that lasted until last year, 1908, and that went out. Then we put in a much larger dam with the county's assistance, and it seems to be secure now unless we have another flood like 1903. That is a very serious matter so we joined, everybody did, and we paid the larger share of the cost of the individual owners, $500.00.

A. The second dam was paid for in 1905, the first dam was paid for I think in 1904, the late fall, perhaps the next spring.
161 The last dam was put in in 1908, I paid the expenses of all of them as far as our share is concerned. There are four letters all relating to the second dam, 1905. (Record 448-449.)

The WITNESS: The water comes from all that great area in a wet year, flows down eastward. There is the station of Kingsville, that is a railroad culvert, there is another one there, and sometimes that whole land is covered with water. There is Cross Creek and there has been three floods from Cross Creek, the worst really on this land. There is the Kaw river and there is a railroad bridge there which was a great obstruction, and when the water would get high in Cross Creek it would turn eastward, flood the town of Rossville and east of the tracks and flow on north through these farms until it would get to the culvert, and it overflowed and knocked out the railroad several times so that traffic was stopped several days, and escaped through that culvert and go over that and on down here and on to Silver Lake, flooding the lower — of this land here (indicating). Now, a very serious part were those three drainage propositions on our hands at all times, it was on hand and is yet. This one (indicating) has been overcome by putting in a dam there, before I parted with it, I sold that land and we got rid of the trouble by putting in a dam here (indicating) and also an embankment here. This is still on hand (indicating).

Q. Did you have any correspondence with the superintendent of the Union Pacific in regard to the condition of those cul-
162 verts that would give you an idea about the time of the negotiation?

A. Yes, sir, in September, 1905, the same time I was at Rossville, caught there by the flood, couldn't get up on the Union

Pacific and I went around by Maple Hill, and that is the time I met this Mr. Gilbert I spoke of yesterday in connection with the sale to Mr. Ensign. They had just had a big overflow from Cross Creek and the next day in company with several citizens there and the secretary of the drainage board, the Rossville drainage board, we went and inspected that bridge. I heard a great deal of talk against it. They were just putting in new concrete piers right in the stream and the bridge was——

A. (Continuing:) The main cause of those overflows of Cross Creek and running down and flooding the town of Rossville and those farms, our land included, and I saw the condition and as soon as I got home I wrote to the superintendent of the Union Pacific describing the condition.

Q. What did the railroad company finally do?

A. They took out that concrete pier in the bed of the stream and built a very much larger bridge, longer and a higher one, adding largely to its length and raising it two feet.

The COURT: You are speaking of the railroad bridge at Rossville?

A. Yes, and we never had any trouble from Cross Creek since. That was only a fraction of the trouble from water on the north side of the railroad, however.

163 Q. What other labor did you perform in regard to protecting that land from these overflows?

Mr. DEAN: We object to the question as calling for incompetent, irrelevant and immaterial testimony.

The COURT: Objection overruled for the present. To which ruling the defendants at the time duly excepted and still except.

A. I did a great deal, it was on hand every year and required somebody's care and attention and I gave it that attention at much expense. I have evidence of that in numerous correspondence here from many parties interested, and we have been trying to get a township ditch built there.

Q. Have you a map showing the conditions?

A. There was also the Boyles ditch we built along in 1905, I think it was. That was after we had lost those Herrington suits. Now, this water comes down and goes through that culvert under the railroad and makes a pond. This is very good land and the outlet of that pond was through a depression in this land right there, (indicating) and it came over here and joined this around at Silver Lake. When he succeeded in stopping that up—Boyles owned this land—they were interested because it was overflowing and we proposed to him that if he would give the land we would build the ditch, half a mile long, which he did. We called that the Boyles ditch—artificial—this is all natural (indicating). We had to do that to carry off the water. Here is a map by the surveyor

164 used in that suit; there is that pond and these dotted lines show the extent of the land—bottom land that was subject to overflow when there was any heavy rains with that Herrington dam in.

Q. That was the cause of the Herrington suit because they dammed the natural depression?

A. Yes, sir; that is artificial there (indicating). The outlet is through there and joins this at Silver Lake. We put in this Boyles ditch.

The COURT: When was that?

A. It was 1905 or '6. (Record 456 to 459).

Witness paid all costs and expenses and also paid his attorney's fees in these matters, including those of Loomis, Blair & Scandrett, the Holden Company's attorneys in the Herrington cases.

At request of the bank in 1906, witness looked after collection of the Jones Anderson notes $1,600 given for part of the purchase price of one of the tracts sold in 1903, and held by the bank as collateral security. He spent much time and was at considerable expense in that connection, sending his man, Mr. Owens, to Anderson's place to investigate and report upon the situation and afterward going himself to see Anderson about the matter. Witness also negotiated with Mr. Alter, cashier of a bank at Rossville for such an amount to be loaned upon Anderson's land as security, as with what Anderson could raise from his crops, would suffice to pay the debt. This was finally accomplished on February 14, 1907, when Anderson paid $1,741.25 in full settlement as appears by a credit in "Collateral Account," of that date.

165 While this effort was going on Mr. Rubey, claim agent of the bank, sent to witness a letter from Anderson, with his (Rubey's) notation on its back, of which following is a copy:

SILVER LAKE, KAN., *Apr.* 22th, 1906.

DEAR SIR: I have herd from you in reguards of the lone I have write to Mr. Holton and told him I could not do eny thing of making the lone now.

If you jeust wate untell this fall I will try to clean you up. If you cannot wate just let me know. If you cannot wate tell fall you will hafter to foreclose. Please let me know when you start. I am busy in my crop and have no time to lose.

If you will wate it will be a comadation to me I cannot do nothing for you just now.

JONES ANDERSON.

APR. 24, 1906.

Mr. Holden, I have written him today that we would proceed to foreclose at once. I will give Robinson the notes tomorrow and have him attend to the matter.

Yours,

J. W. RUBEY.

The bank never offered to pay witness anything for his services or for his expenses in this matter. Witness says he, "did not want them to, felt it was my business."

Witness also helped to collect the four Hartzell notes $3,500 given on account of purchase of land in 1903, of the proceeds of one of these, $500 and $22.60 interest the bank applied $502.13 to pay-

ment of interest to Aug. 20, 1903, on the note for $72,891.30 and the balance $20.47 for interest on the note $1,586.85 to Sept. 18, 1903, as appears on said notes. Plaintiffs did not direct such application of the money and did not learn of it until some time afterward (Record 460 to 467).

166 The taxes due in the fall of 1904, were not paid until August, 1905, after being advertised for sale. Was unable to pay them himself and went to the bank and told them about it. Mr. Rubey asked him to write and get information about the taxes, which he did and took it to the bank and they paid the amount. The bank had not given any attention to the taxes until he called attention to them. The taxes for 1905, were not paid until we closed up the six sales in Jan., 1906. I called attention to them and gave bank a statement, and they were paid in connection with closing up the sales. Witness had arrangement with the treasurer by which the penalty was avoided, as taxes were delinquent. They were charged to him in the collateral account Jan. 3, 1906, cashier check to F. C. Bowen $1,272.19. He was the treasurer and that was the amount. Witness paid part of the taxes for 1906. The voucher turned in here shows $367, and some cents. Paid them before they were due. The balance the receiver paid, was planning to pay them himself as soon as he got the money. The receiver paid the balance of the 1906 taxes in 1908, together with the 1907 taxes. Bank never paid any taxes for 1908. They were paid by witness. There were eleven dwelling houses on the Shawnee County lands (Record 469-471-484).

Has been in possession of the 110 acres in Jackson County, Mo., from the time it was bought and conveyed to Winants until now.

167 Looked after it—went to it quite often, leased it, collected rent, except for one year Mr. Donnelly collected it and paid it over to the bank to be credited to me. Kept up repairs on the property and did all things necessary to protect it. Am not credited with the $250 collected by Donnelly. Paid for repairs on the houses. "Here is the bill paid Hoelzel Lumber Company $27.85 paid by me. That was March 8, 1905. My check for $25 on American National is attached to it and the balance $2.85 I gave to the man and he paid it. Then there were every now and then some small items of expense, windows broken or something of that kind which were reported to me and I furnished the money to replace them without keeping any account of them. I also paid a man by the name of Tippett five dollars a month for a long while to look after that property—he lived out close by—after that and the coal mine property." Receipted bill and check offered in evidence as Ex. C. 78 (Record 497).

Q. You spoke of having Thomas Tippett employed there?

A. Yes, sir.

Q. Is he still looking after the property?

A. No, sir; I don't know where he is now.

Q. How long and through what years did he look after the property for you?

A. He was there in 1905, and part of 1906, if I remember.

Q. Mr. Holden, it appears from the record of this case that this

was conveyed subject to a mortgage of $4,200; what became of that mortgage, if you know?

A. That was a mortgage to Patrick Corrigan represented by P. H. Madden, Kansas City. I paid the interest on it from time to
168 time and there was some that was past due and on May 1st, 1905, I took a check to Mr. Madden for $150 on the American National Bank to apply on the interest. He declined to receive it stating he had instructions from Mr. Corrigan to call for the whole amount, he wanted the money, so I took the check back, there is the stub of my check book.

Q. After they declined to receive payment for this interest then what was done?

A. Shortly afterwards advertised by the trustee for sale. I was planning to pay it and had my arrangements partly made for it, but not complete when we were within two or three days of the date of sale. I then went to Mr. Rubey and told him of it, and he stated, tell Mr. Madden to bring the note and mortgage around here and we will take it up but you have got to pay the trustee's fee and the advertising cost. I told him all right I would do it. Mr. Madden got his pay.

Q. About what time was this you had this talk with Rubey?

A. It was about June, some time in June, 1905.

Q. You spoke of $57.92 costs, I will ask you if the bank charged you that amount?

A. Yes, it appears so in the collateral account here, July 12th, 1905, J. W. Rubey $57.92.

Q. I will ask you if you had any communication from the bank in regard to this matter?

A. Here is Mr. Rubey's letter June 28th, 1905, addressed to me.

Mr. GARNETT: We offer the letter in evidence.

169

NATIONAL BANK OF COMMERCE,
KANSAS CITY, MO., *June* 28, '05.

Mr. Howard M. Holden, City.

DEAR SIR: On June 3d, I gave my personal check for $57.92 to Mr. J. C. Rosenberger, $35 of this was for trustee fees on account of the sale which he was to make of the 110 acres of ground on that date, $22.92 was the cost of advertising. Inasmuch as I paid this out of my own pocket, I would thank you to kindly send me a check for this amount.

Yours very truly,

J. W. RUBEY.

Q. I believe you have testified on this collateral account you were charged with that?

A. Yes, sir.

Q. On July 12th, on the collateral account, charged to H. M. Holden, J. W. Rubey $57.92, I will ask you if you paid that bill Mr. Holden, to the bank?

A. I did, paid to Mr. Rubey.

Q. How did you pay it, Mr. Holden?

A. I drew my check on the American National Bank, which is at-

tached, for that amount and drew the money and took the currency and gave it to Mr. Rubey.

Q. Is this the check you drew on the bank?

A. It is that date, it has been paid by the bank.

Mr. GARNETT: We offer the check in evidence together with his testimony.

Q. Now, Mr. Holden, have you examined this collateral account to see whether you were credited with paying that amount?

A. Yes, sir, and there is no credit I can find for it.

170 Q. What finally became of that mortgage if you know, Mr. Holden?

A. It was taken up in June, 1905, and on October 6, 1906, it was charged to my collateral account as appears by this $5,246.94 that is some five or six hundred dollars more than they paid in taking it up. I don't know what the difference stands for, says mortgage for 150 acres near Leeds, I don't know where it was in the meantime.

Q. Do you know what amount the bank paid in June to take up the mortgage?

A. I can ascertain at the hotel if you want the figures on it, I have got the figures there.

Q. You haven't the figures there?

A. I haven't got the figures here (Record 499 to 504).

Q. Mr. Holden, after you made the last payments on this debt you have testified to, did you make any effort to ascertain from the bank the amount of the balance that was due?

A. Yes, sir, I did.

Q. Did you write any letters to the president of the bank on that subject?

A. I did.

Q. Have you any of those letters with you?

A. I think I have (witness produces letters).

Mr. GARNETT: We offer in evidence copy of letter to W. S. Woods, president of the National Bank of Commerce, dated February 18th, 1907.

The letter in question was read to the court, was marked Exhibit C-81 and is in words and figures as follows, to-wit:

171 Copy.

Howard M. Holden, 665 Gibraltar Building, 818 Wyandotte St. Bell Tel. 4281 Main.

KANSAS CITY, MO., *Feb. 18th*, '07.

Dr. W. S. Woods, Pres. National Bank of Commerce, City.

DEAR SIR: Knowing your wish that the Bank realize as rapidly as possible, I have made every effort to make sales of the land without undue sacrifice, which you have advised against. It has been a little slow, owing mainly I think, to the furor- for lands farther West and South, which the railroads and the land agents have so actively worked up and which has largely carried the tide past the more

Eastern sections, and partly because of the cloud that remains to some extent upon lands near the River on account of the big flood.

When the sales now under contract to be closed by March 1st and on which cash payments are now in your hands, are closed, the amounts received within a little over a year aggregate over $102,000, exclusive of anything from the crops of 1906.

It might be that I could relieve you altogether of the matter within a very brief time. Will you kindly advise me the amount required for that purpose and to redeem the property. I will do my best to close up this old matter and then to make myself useful to you in any way I can in live matters.

Yours truly,

H. M. HOLDEN.

(Record 504-5.)

172 Q. I will ask you, Mr. Holden, if this is the letter you received in reply to the one of the 18th through the mails?
A. It is.

Mr. GARNETT: We now offer in evidence letter from Dr. Woods dated February 20th, 1907.

The letter in question was marked Exhibit C-82, was read to the court and is in words and figures as follows, to-wit:

KANSAS CITY, Mo., *Feb. 20th*, '07.

Mr. Howard M. Holden, 665 Gibraltar Bldg., City.

DEAR SIR: This is in answer to yours of the 18th. I beg to say I will have the matter looked up, and see just where I stand. Of course, I have had but little to do with the details of this proposition.

Yours very truly,

(Signed) W. S. W., *President.*

(Record 507.)

Q. Did you answer that letter, Mr. Holden?
A. I did, right there, I looked for his report and didn't get it and on March 5th, I wrote that additional letter.
Q. Is this a copy of the letter you wrote?
A. Yes, sir.

The letter in question was marked Exhibit C-83, and is in words and figures as follows, to-wit:

173 Howard M. Holden, 665 Gibraltar Building, 818 Wyandotte St.

KANSAS CITY, Mo., *March 5th*, '07.

Dr. W. S. Woods, Pres. National Bank of Commerce, City.

DEAR SIR: In yours of the 20th Ult. in reply to the suggestion contained in my letter of the 18th, you said you would "have the matter looked up," and I have been hoping to hear from you. I am most anxious to get my affairs in shape, and I had a definite plan

in view for what I suggested, which I think I could carry out, if I can be in position to act, but may lose by delay.

If, before you go away, it would be possible for you to advise me of the amount required, I would feel greatly obliged and relieved.

Yours truly,

(Signed) H. M. HOLDEN.

(Record 509.)

Q. Did you get an answer to that?
A. Yes, sir.
Q. This came through the mails addressed to you?
A. Yes, sir.
Q. That is his answer to that letter?
A. Yes, sir.

Mr. GARNETT: We offer in evidence letter dated March 6th, 1907, from W. S. Woods.

Mr. DEAN: No objection.

The letter in question was marked exhibit C-84, was read to the court and is in words and figures as follows, to-wit:

174 KANSAS CITY, Mo., *March* 6, 1907.

Mr. Howard M. Holden, Kansas City, Mo.

DEAR SIR: I leave for California, probably to-morrow. I am awfully awfully busy, but will wind everything up as far as I can, and try to leave it in the hands of some one who can go ahead with it, if Mr. Pratt is not able to be here. I think, however, Mr. Pratt expects to be back Monday.

Yours very truly,

(Signed) W. S. WOODS, *President*,
Per W.

(Record 511.)

Q. Now, Mr. Holden, did you then make any personal effort yourself to find out the amount due the bank?

A. I asked Mr. Pratt about it as he suggested. Mr. Pratt was his confidential man, stenographer, and I followed his advice, suggestion, asked him about it and Mr. Pratt said he didn't know anything about it. There was no one else to ask and I dropped the matter until Dr. Woods returned from California.

Q. Did you have any talk with him after he got back from California?

A. The next thing I heard was that.

(Witness produces letter.)

Q. A letter to you?
A. Letter from him.

Mr. GARNETT: We offer letter from Dr. Woods dated April 15th, 1907.

Mr. DEAN: No objection.

The letter in question was marked exhibit C-85 by the stenog-

rapher, was read to the court and is in words and figures as follows, to-wit:

175 National Bank of Commerce, Kansas City, Mo.

(Officers' names omitted.)

KANSAS CITY, MO., *April* 15, 1907.

H. M. Holden, Esq., City.

DEAR SIR: I am home again and ready to commence selling land. Hope also that you have some deeds to be signed and some deals to be closed up.

Very truly yours,

W. S. WOODS, *President.*

(Rec. 513.)

Q. Did you answer that letter, Mr. Holden?
A. Yes, sir. (Witness produces letter.)
Q. Is that a copy of the letter written him in reply to that?
A. Yes, sir; in reply to that.

The letter in question was marked exhibit C-86 by the stenographer, was read to the court and is in words and figures as follows, to-wit:

Howard M. Holden, 665 Gibraltar Building, 818 Wyandotte St. Bell Tel. 4281 Main.

KANSAS CITY, MO., *April 16th,* 1907.

Dr. W. S. Woods, President, National Bank of Commerce, City.

DEAR SIR: Yours of the 16th received. Am glad that you have returned and hope that all is well with you and yours.

176 While you were absent I got all the sales closed that were under way when you left as you are probably already aware. I have been giving a full measure of attention to the making of further sales but have nothing more under contract, yet, though one good sale seems near that point.

An agent at Abilene whom I know wrote me for a new price list a month ago saying he had a client who wanted to buy and would go down to see the land at once. I replied fully and gave full directions to our man on the place about meeting and showing him about, etc., but hearing nothing further, wrote the Agent about ten days ago and received a reply saying the party had been delayed but was in earnest and would surely go down soon. The Topeka Agents through whom we have made sales also have buyers "on the string," an Iowa man, friend of one who has bought, seems very close to buying one of the Sections, and Mr. La Fontaine who lately bought, is talking of extending his purchase. I am expecting almost daily that something definite will develop from some of these and shall keep at it and believe we shall make some more good sales very soon.

The Spring is always a rather quiet time with farm lands. Relocations following sales in the previous fall and winter have gen-

erally been made and farmers are all busy with their spring work. And I think the Wall Street racket has caused some to hold off to see what it will amount to.

When up there two weeks ago I had an offer of our price, from a neighbor, for a quarter of one of our full sections but I thought his terms and amount down inadequate and would not suit you and besides, it seemed unwise just now to break into the Section. It is one that the Iowa man is talking of buying.

After you left, I hoped, as your letter of March 6th indicated I might, to find some one at the bank who could give me the information I had asked for, but Mr. Pratt was away and no one else seemed able to do so and so I dropped the subject for the time.

177 When I first mentioned it, I think I could have relieved you of the whole thing in a very brief time could I have known the amount required. This I believed would please you and that consideration and the great desire I have to get my own matters in shape, moved me then and moves me still. I hate to bother you, Doctor, with all your cares—I would far rather help you—but in this matter I am thinking that while I am bothering I am also helping you, for no one knows better than I, that a bank wants such things cleaned up.

If you will have the matter figured up as soon as practicable, and let me know the amount, I will give immediate and earnest attention not only by sales as I am now doing, but by raising money otherwise, so as to get the matter speedily disposed of to your entire satisfaction. Would you not like me to do this?

When in any possible way I can be of service to you, command me.

Very truly yours,

H. M. HOLDEN.

P. S.—I think everything is going on well at the farm, though it is rather dry for the wheat.

(Rec. 515-519.)

Q. Did you get any reply to that letter, Mr. Holden?

A. I did not.

Q. What did you then do?

A. As I recollect Dr. Woods went away shortly after that on east for the summer, which I believe is his habit and nothing was done. I had some sales, figuring on them, but in the summer time is no time to be selling land, and along in the fall I resumed efforts towards selling and had some sales on the way when the bank closed, and after it went into the hands of a receiver I then wrote

178 that letter to Dr. Woods. I couldn't continue the efforts of selling myself because I couldn't get releases after the bank failed, so I hung up for awhile and afterwards I closed some of them. I had an arrangement with the parties on the other side.

Q. This letter you wrote dated December 19th, 1907, to Dr. Woods?

A. Yes, sir.

Q. You mailed it to him?
A. Yes, sir.
Q. Is this a copy of it?
A. Yes, sir.
Mr. DEAN: Was that while the bank was in the hands of a receiver?
A. Yes, sir.

Mr. GARNETT: We offer the letter in evidence.
Mr. DEAN: We object to the letter as being incompetent, irrelevant and immaterial, and the bank at that time being in the hands of a receiver.
The COURT: Overruled.
To which ruling the defendants at the time duly excepted and still except.
The letter in question was marked exhibit C-87, and is in words and figures as follows, to-wit:

Howard M. Holden,
665 Gibraltar Building,
818 Wyandotte St.
Bell Tel. 4281 Main.

KANSAS CITY, MO., *Dec. 19th*, 1907.

Dr. W. S. Woods, Pres'd. National Bank of Commerce, c/o Commerce Trust Co., City.

DEAR SIR: I very deeply sympathize with the efforts that
179 are being made for the re-opening of the bank and if, in any way, I can contribute thereto, I desire to do so. If you see any manner in which I can do that, command me.

I had a number of sales of the Shawnee County lands under active consideration with buyers when the money troubles commenced in October, but that naturally hung them up for the time being. One or two of them I have hopes of yet closing, and new ones are being attempted with fair prospects.

I am quite sure that you would like to have the matter cleaned up and it might be especially helpful to you at this time that it should be done. If I could know the amount required for that purpose and to redeem the property, I would make a special effort to accomplish it within a brief time. If this seems desirable to you, send me a statement of the matter showing the amount, and I will go at it.

I write this to you rather than to the Receiver, as you are familiar with it and can probably more readily advise me. If you say I had better see him, I will act on any such suggestion which you may make.

Awaiting your reply, I am,
Yours very truly,

H. M. HOLDEN.

Q. Did you receive this letter in reply to that (handing witness letter)?
A. Yes, sir, I did.

Mr. Garnett: We offer the letter in evidence, dated December 20th, 1907.

Mr. DEAN: We make no objection.

The letter in question was marked exhibit C-88 by the stenographer, was read to the court and is in words and figures as follows, to-wit:

180

Commerce Trust Company,
Kansas City, Missouri.

Capital, $1,000,000.

Officers: Dr. W. S. Woods, President; W. T. Kemper, Vice President; H. C. Schwitzgebel, Secretary and Treasurer; Hugh C. Ward, Counsel. (Directors names omitted.)

KANSAS CITY, MO., *Dec.* 20, 1907.

H. M. Holden Esq., City.

DEAR SIR: I have yours of the 19th instant, for which please accept thanks.

Beg to answer that, of course, you have been through the very same experience I have and know that I am discredited, and really have nothing to do now with the winding up of the bank. If it is opened again, I apprehend they would like to have you continue to sell the lands for them. The fact is, they cannot do better than to have you continue to sell the lands any way. But really I am out of it. I think it best not to say anything to the people in the matter now, not until something can be determined about the reopening of the bank.

Yours very truly,

(Signed) W. S. WOODS.

(Rec. 519-521.)

Q. Now, after receiving that letter did you make any effort again to get a statement from the receiver of the amount of your account?

A. I did; I went to him and put the whole situation before him, told him all the facts, and he asked me to see his attorneys and also to make a written statement to him of the matters as I had

181 stated them. That I did and also the attorneys and saw them. I saw him several times afterwards but they immediately got into the work of trying to reorganize and so everything was hung up about the receivership excepting formal matters and nothing further occurred. He expressed his desire to take the matter up but under existing conditions said he couldn't do it until he ascertained what would be the outcome of the efforts to reorganize the bank.

Q. In your letter to Dr. Woods you said something about some sales he was——

A. (Interrupting.) Yes, sir.

Q. Did you make any of those sales after that?

A. I made one in particular that had been on hand. I think

others dropped away from me by the lapse of time but we made some other sales shortly afterwards, made four sales in all since then.

Q. Did you have an arrangement with the Terrace City Company in regard to the proceeds of these sales?

A. Yes, sir.

Mr. GARNETT: We offer in evidence a stipulation between the plaintiffs in this case.

Mr. DEAN: We make no objection.

The stipulation was put in evidence, being the same as is included in Referee's Finding No. 89.

Q. Mr. Holden, you made some sales after the date of this agreement?

A. Yes, sir.

Q. Have you a memorandum of the amounts turned over
182 to the Terrace City Company and the dates of the amounts, have you that statement?

A. I haven't the separate dates nor separate amounts, I have on a sheet of paper what I think represents the total amount.

Q. You can obtain the dates on which these amounts were turned over?

A. I can at Kansas City, I have a record of it there, but I can give you the total amount.

Q. What is that total amount?

A. $31,310.07, that I think is correct.

Q. There were four of these sales?

A. Yes, sir.

Q. Four different purchasers?

A. Four different purchasers.

The COURT: That money I understand was paid over to the Terrace City Realty & Security Company?

A. Yes, sir, to await the result of the suit.

Q. Who conducted those sales?

A. I did.

Q. Just the same as the others you testified to?

A. Yes, sir.

Q. Paid for the abstracts?

A. Yes, sir.

Q. Did everything towards closing it just as you did on these other sales?

A. Yes, sir, everything.

Q. Do you remember now any other conversation with Dr. Woods or any of the officers of the bank in charge relating to this matter and relating to your debt that you was trying to pay off there, after the time of these agreements?

A. We had a great many conversations at odd times, I remember one in particular, it was in January, 1907, I went to his office one morning to speak to him about some feature of one of the sales we had going on at that time.

183 Mr. DEAN: We object to any conversation with Dr. Woods at that time for the reason that at that time Dr. Woods had

no interest in the matter and the bank was in the hands of a receiver.

A. (Continuing:) No, the bank closed its doors December 5, 1907, and this is January, 1907. There was a stranger sitting near by in his room and I started in to speak of the matter that I went there to see him about and he turned to this gentleman and called him up and introduced him to me. Mr. Wheeler, who had come, he stated, to take Mr. Rubey's place, who had moved away and he remarked to me that Mr. Wheeler had come to take Mr. Rubey's place and would have my matter in charge, and he said to Mr. Wheeler, Mr. Holden borrowed some money of the bank and gave a mortgage on about five thousand acres of land in Kansas and is selling it off to pay the debt. Those were remarks made at the time and then we took up the matter that I went to see him about. At different times there were similar remarks made by him. He spoke often or whenever the subject came up he would speak about it, he spoke of it as a debt, I never dreamed he thought otherwise of it.

Q. Mr. Holden, I will ask you if at any time either the bank or any of its officers or the Inter-State Trading Company or any of its officers made any statement to you indicating that they claimed ownership of any of this property?

A. They never did.

Q. Did ever the bank or any of its officers or the Inter-State Trading Company demand of you possession of the land?

A. They never did.

184 Q. Did they ever intimate to you in any conversation with you, any officer of either one of the defendants, that they claimed any ownership in the land?

A. They never did.

Q. Have you any knowledge, Mr. Holden, of any sum of money that was paid to the bank by any one other than yourself out of the proceeds of this land you have testified to on your debt to the bank except shown on that collateral account?

A. I have not.

Q. Now, I will ask the general question—about how much of your time have you given to looking after the real estate described in your petition since the beginning of the first of the year 1905, up to the time of bringing this suit?

A. That would be hard to say, but I think certainly as much as half, in fact having this matter on my hands practically precluded my undertaking much of anything else.

Q. Have you any idea of how much money you have spent in railroad fare, hotel bills, telegraph and telephone bills and other incidental expenses in looking after this land since January 1st, 1905, up to the time of bringing this suit?

A. Why, I have put in vouchers here aggregating $1,955.91. It was a great deal beyond that that I kept no account of, such as the use of a typewriter. I had a typewriter employed most of the time and she was occupied a great deal with this matter. I used the telephones and telegraph wires a great deal, kept no account of that at

all. Postage and my hotel expenses—I made a great many
185 trips to the farm. Though having a first class man there, I always felt like giving it personal supervision and each one of these sales was attended with a great deal of labor before they could be brought to a contract and before it could be closed up, and always in selling property a great many attempts at selling that don't result in anything, and my railroad fares every time—I would come up to Topeka and in going to the farm would cost anywhere from six or eight to twelve or fifteen dollars and various incidental expenses that I cannot recall. In addition $1,955 which I have turned in in vouchers. I can say we also had a great many expenses at the farm, expenses in a small way that were not in shape to put in here, hardly worth while to attempt to present. Payments made by Mr. Owens and expenditures down there in taking care of that coal mine property and the 110 acre property. I believe I would be perfectly safe and within bounds to say that during that period I had paid out as much as $3,500 and probably more than that including this nearly two thousand dollars that I have turned in vouchers for. That does not include Mr. Owens' salary.

Q. I believe you testified that salary was $75 a month?

A. Yes, sir.

Q. Nine hundred dollars a year?

A. Yes, sir.

Q. How long has he been there?

A. Whatever came in on this commission account would go towards helping that out, what didn't have to go to the agent or somebody else. He was there for years before 1904.

186 Q. I mean just since this, he was the man you had in charge before this?

A. Yes, pretty near raised on the place, he was there when I bought the place twenty-five years ago, a boy, grown up there.

Q. You spoke of a commission paid to Noble & Co. for some sale, what sale was that?

A. There were two sales. I wish to correct myself on going over that commission matter yesterday. There were two sales to La Fontaine, one for $11,990 and the other, I think it was, and the other $3,174, and I said the commission in the La Fontaine sale went to Geo. M. Noble & Co. The small sale was fifty-two and a fraction acres lying between two tracts of land that he was wanting to buy. We had already contracted that fifty-two acres to Wm. Bond up there and Mr. La Fontaine would not make his purchase of other land without he could get that. Mr. Noble telephoned he had a customer for it. I told him it was agreed upon to be sold to Mr. Bond, that I wasn't free to make any sale of it. They went after Mr. Bond and paid him a bonus to get him to step aside and let La Fontaine take it and wanted La Fontaine—he was to allow La Fontaine to take his place. Of course we had no objection to that, but Mr. Owens had made that sale through my assistance to Bond and it was carried out and no commission was paid on that to Mr. Noble although probably the reading of my testimony would leave it open to the construction of both sales.

Q. As I understand you, there were two sales to Mr. La Fontaine?

A. Yes, sir; I went to Mr. Noble this morning to ask him about it.

187 Mr. DEAN: There wasn't any sales made there wasn't any commission paid on?

A. No, sir.

Mr. GARNETT: We offer a letter from the Bank of Topeka in evidence, dated February 23, 1906, being a letter produced by the defendants.

Mr. DEAN: We make no objection.

The letter in question was marked Exhibit C-90 by the stenographer, was read to the court and is in words and figures as follows, to-wit:

* * * * * * *

Bank of Topeka.

TOPEKA, KAN., *Feb.* 23, 1906.

J. W. Rubey, Claim Dept., National Bank of Commerce, Kansas City, Mo.

DEAR SIR: Yours of 20th enclosing quit claim deed, release of mortgage, affidavit, etc., pertaining to the W. ½ of S. W. ¼ of Sec. 1-11-13 sold Geo. C. Bills, received.

We credit your account with $3,579.50.

We have paid Mr. Noble's commission $117.50.

We have paid for recording release of mortgage, Holden quit claim deed and the affidavit $3.

It was proper for you to pay these items.

We were to collect $3,700 for you and the draft enclosed is for that amount less the $120.50 paid out as above.

Yours truly,

J. R. MULVANE, *President.*

(Record 524 to 534.)

188 James A. Patten's note $75,005.97 offered in evidence as Exhibit C-91 and is as follows:

$75,005.97.

KANSAS CITY, Mo., *Jan'y 13th*, 1905.

On demand after date, I promise to pay to the National Bank of Commerce of Kansas City, Mo., on order Seventy five Thousand & Five 97-100 Dollars, at the National Bank of Commerce, Kansas City, Mo., with interest from maturity, payable annually at the rate of eight per cent per annum. If not so paid compounded.

Value received.

JAMES A. PATTEN.

No. 176230. Due Dm.

On acct. and secured by note & mtg. H. M. Holden Land & Live Stock Co.

The following endorsements appear on the back of said note:
Interest paid to and including Aug. 31, 1905—8-26-05. Chg. Holden Collat. acct.
Interest paid to Jan. 31, 06—2-9-06.
Interest paid to & inc. July 31, 06—7-3.
Interest paid to & inc. Oct. 31, 06—10-16.
Interest paid to & inc. Jan. 31, 07.
Interest paid to & inc. July 31, 07.
Interest paid to & inc. Nov. 30, 07.
Pay to the order of — without recourse.

NATIONAL BANK OF COMMERCE,
Kansas City, Mo.
GEO. F. CUTTS, *Receiver.*

(Record 536.)

Cross-examination by Mr. DEAN:

Witness states that his business had been largely operating this large farm, that he had never been engaged in the real
189 estate business buying and selling land, that in incorporating the Holden Co. he, "had an idea that one or both of my sons might succeed to the handling of it and my idea was to divide it up with them until later on until I saw what they were going to do. We were doing a very large business up there, cattle feeding, etc." (Record 540-542).

Q. After the Holden Land and Live Stock Company made that mortgage to the Mutual Benefit Company and the mortgage to yourself for eighty-two thousand dollars you sold considerable portions of that land, didn't you?

A. Yes, sir.

Q. Now, did you sell any of this land in 1903, and prior thereto?

A. Sold eighty acres in 1902.

Q. You sold eighty acres, the east half of the southwest of 5-10-14 to Jones Anderson for two thousand dollars, didn't you?

A. Before that I sold eighty acres to Dr. Pratt.

Q. Just answer my question?

A. I did.

Q. Now, that was sold before, that was sold in 1903, wasn't it?

A. Yes, sir, spring of 1903.

Q. Those notes you immediately turned over to the National Bank of Commerce, didn't you?

A. Yes, sir.

Q. And they were afterwards paid and appear on the debt of the National Bank of Commerce?

A. He paid the sixteen hundred dollars of notes, he paid four hundred dollars in cash and the whole proceeds went to the National Bank of Commerce. In order to get release I paid a thousand
190 dollars independently to the Mutual Benefit, formed a part of the twelve thousand dollars they got out of that property, sale in the spring of 1903. The whole proceeds went to the Bank of Commerce including the sixteen hundred dollars in notes and those notes were foreclosed by the Bank of Commerce and the pro-

ceeds, as I have already shown, credited to my collateral account in 1906 or '7.

Q. The cash payment of four hundred dollars, what did you do with that?

A. It is hard to state that separately from these other sales, there were a number of sales, they were all combined together and twelve thousand dollars was paid to the bank to get—I don't mean the bank, the Mutual Benefit to get releases and the balance was paid to the bank, nearly the balance, there was some amount that I asked Dr. Woods to let me have.

Q. There is a credit here, interest paid at different times, how were those interest payments made in 1903?

A. Paid by me out of my private funds.

Q. And they were paid as stated there on the endorsements on the note, were they?

A. Yes, sir.

Q. Actually paid in cash?

A. Paid by me in cash .

Q. There is an endorsement of two thousand dollars there?

A. Yes, sir.

Q. What was that?

A. We sold the south half of the southwest quarter of Section 2-11-13 to Dr. Pratt for five thousand dollars and three thousand of it went to the Mutual Benefit and two thousand, the balance, to the bank and credited July 21st, 1902.

191 Q. That was paid in cash?

A. That was paid in cash.

Q. These were paid in cash by you?

A. By me.

Q. Now, you sold the northwest quarter of 18-11-14 to John E. James on April 1st, 1903, didn't you?

A. Yes, sir.

Q. For $5,418?

A. Well, we sold that whole quarter section to William Bond and James, I think it was, all in one deed, I am not sure about that.

Q. That was on April 1st, 1903?

A. It was about that time closed up, perhaps then.

Q. What did you do with that money?

A. The notes went to the bank, the cash was combined with the cash from these five other sales and the twelve thousand dollars went to the Mutual Benefit and the rest of it went to the bank less an amount I retained myself for my own use, I do not recall how much it was, it was understood by Dr. Woods.

Q. And also on April 1st, 1903, you sold the south half of the southeast quarter of 11-11-13 to Kasebaum and Oliver and lots one and two in northeast of 14-11-13 for $5,700?

A. Yes, sir.

Q. And you also sold the south half of the southwest quarter and part of the north half of the southeast quarter of 14-11-13 to C. M. Hosack for four thousand dollars, didn't you?

A. I think so.

The COURT: What year was this?

Mr. DEAN: 1903.

192 The WITNESS: That all goes to make up that 639-19 acres we testified to heretofore.

Q. You sold another forty acres that you haven't said anything about, didn't you, to Pratt on July 17th, 1902, the south half of the southwest quarter of 2-11-13?

A. I just told you about that, that five thousand dollar sale.

Q. You sold that July 17th, 1902 didn't you?

A. It is exactly what I was explaining to you, you asked about that two thousand dollar credit and I told you that sale, three thousand went to the Mutual Benefit and two thousand to the bank.

Q. So that prior to these transactions in the spring of 1904, you had sold as a matter of fact 640 acres hadn't you?

A. 639.19 acres of that land.

Q. That left how much?

A. I couldn't tell you the exact acreage, forty-nine hundred and some acres.

Q. So that to the time of the transactions in the spring of 1904, there remained of that original body of land or quantity of land only about forty-nine hundred and some acres, is that right?

A. There remained forty-nine hundred, close to five thousand acres, fraction under it, forty-nine hundred and some odd acres.

Q. As a lien against that land there existed at that time the mortgage of the Mutual Benefit Life Insurance Company and the balance due on the Howard M. Holden mortgage of eighty-two thousand dollars, didn't there?

A. Yes, the balance due on the Mutual Benefit, it was reduced to seventy-five thousand dollars.

193 Q. Now, the balance due January 13th, 1907, was $75,005.97, there was due on the Mutual Benefit mortgage the sum of $75,005.97?

A. No, sir.

Q. I mean 1905?

A. I am unable to state just exactly the amount that was due. I had nothing to do with the making of that Patten note from which you quote and consequently I have no means of knowing whether that was the precise amount or not. I am willing to assume that it was, though.

Q. Now, to get before the court the exact situation with reference to this Mutual Benefit mortgage I want to ask you if it isn't true that you defaulted on interest due in January, 1903; you defaulted in the payment of the taxes on that land for 1902; you defaulted in the payment of the premiums for insurance on the buildings on this property which policies had been assigned to the Mutual Benefit, so that on May 14th, 1904, you was indebted to the Mutual Benefit Life Insurance Company in the sum of $6,253.30 on account of defaults that you had made in the payment of taxes, interest, premiums on fire insurance policies held by the Mutual Benefit and other miscellaneous expenses incurred by the Mutual Benefit in protecting its security on this land?

Mr. GARNETT: We object to that question as being exceedingly complex, calling for the answer of the witness on a good many different state- of facts and calling for a conclusion of the witness which might be drawn from any facts that would be testified to.

The COURT: The witness can state whether he can answer the question or not.

194 To which ruling the plaintiffs at the time duly excepted and still except.

A. It is not, everything in the way of interest, taxes and insurance premiums had been paid with promptness when due up to the time of the flood in June, 1903.

Q. Did you pay the interest due on the Mutual Benefit mortgage on the first day of January, 1904?

A. No, sir.

Q. Then on May 14th, 1904, you owed the Mutual Benefit the interest due on its mortgage on January 1st, 1904, didn't you?

A. Yes, sir.

Q. Did you pay the interest that was due the Mutual Benefit Life Insurance Company on July 1st, 1903, at the time it fell due?

A. Did not, that was after the flood.

Q. So that on May 14th, 1904, you was indebted to the Mutual Benefit Insurance Company for interest due July 1st, 1903, on its mortgage?

A. I think that is the case.

Q. Did you pay the taxes that was due on this land in 1903 and '4?

A. Did not.

Q. So that on May 14th, 1904, there was delinquent taxes against that land amounting to $1,937.74, wasn't there?

A. I did not know of that amount of taxes of 1903, due in December, 1903, that had not been paid.

Q. Did you pay the premiums on the insurance policies that was pledged to the Mutual Benefit Life Insurance Com-

195 pany?

A. Everything that arose prior to the flood.

Q. That was due up to May 14th, 1904?

A. I cannot tell you about the date of that. If it arose after the flood I would say no. That is the date in my mind as to when everything was paid.

Q. You owed the Mutual Benefit Life Insurance Company on May 14th, 1904, the sum of $6,253.30 on account of delinquent taxes and premiums on insurance policies and overdue coupons and interest on them, etc.?

A. As to the accuracy of that total sum I can't say, that was the amount that the Mutual Benefit stated and for which I gave my note May 12th, 1904.

Q. You made a settlement then with the Mutual Benefit Insurance Company, in which you provided for the payment of that amount of delinquencies?

A. I have given the bank my note on that date for that sum.

Q. At that time the Mutual Benefit mortgage was in the hands of Valentine, Goddard & Valentine for foreclosure?

A. I don't know whose hands it was in.

Q. You knew it was in the hands of lawyers for foreclosure?

A. I knew they were talking about foreclosure, I didn't know whose hands it was in.

Q. You knew it took that much money to pay the Mutual Benefit Life Insurance Company to reinstate the mortgage and prevent a foreclosure, didn't you?

A. I think that was the case, I don't know I knew about the foreclosure.

Q. You couldn't pay it, could you?

A. No, sir.

196 Q. You therefore went to the National Bank of Commerce and laid the situation before that bank, didn't you?

A. It was up between the bank and myself for consideration, I don't know whether I went to them or they came to me.

Q. At the same time, May 14th, 1904, you owed a large amount of money to the National Bank of Commerce, on your individual note secured by a collateral note of the Holden Land and Live Stock Company?

A. Yes, sir.

Q. Now, you made a settlement with the bank on that day of the amount that was due the bank on their note, didn't you?

A. On what date?

Q. On or about the 14th day of May, 1904?

A. They made up the figures on what they claimed to be due, and there was a re-arrangement of the securities at that time, May 12th.

Q. And in order to reinstate that mortgage and for your benefit the National Bank of Commerce paid the Mutual Benefit Life Insurance Company all of your defaults, didn't they, in cash?

A. They paid that amount, $6,253.30.

Q. And reinstated the mortgage for you?

A. I understood the mortgage was reinstated.

Q. For you?

A. It was reinstated.

Q. Done at your earnest request, wasn't it?

A. I think I desired to have it done.

Q. In order to get that done you consented to the payment of $102 to the attorneys who had that mortgage in their hands

197 for foreclosure, didn't you, and did pay it or had it paid?

A. I raised no question on the amount for I was not in position to do it.

Q. Then the Mutual Benefit mortgage was reinstated and in good standing again after the bank put up this money for you, is that right?

A. I think it was.

Q. And at the same time you made a deed to the Inter-state Security Company for all of this land and put it up in escrow with Mr. Patton, didn't you?

A. No, sir.

Q. You didn't?

A. Did not, I made a deed to the Interstate Trading Company on May 12th and it was passed over into the hands of Mr. Patton as the claim agent of the bank.

Q. I will ask you if you signed that deed, is that your signature (showing witness deed)?

A. I did, yes, sir, Holden Land and Live Stock Company by me as president.

Q. At that time you executed this deed which is marked Exhibit C-74 and it was deposited in escrow under the agreement, a copy of which is set up in the amended petition herein, wasn't it?

A. It was not.

Q. You say this deed was not deposited in escrow?

A. That deed was executed and delivered on the 12th day of May under the first agreement which is in evidence here, to the Interstate Trading Company.

Q. As a consideration for the execution of that deed the sum of $83,975.32 is stated, what did that represent?

A. It represented what the bank claimed to be due on
198 the note that was a second renewal of the balance on the eighty thousand dollar note, and also that $6,253.30 note that was given for the amount paid the Mutual Benefit which I executed on the 12th day of May.

Q. It represented what the bank claimed to be due on your individual indebtedness to the bank, and the $6,200 that the bank at that time paid to the Mutual Benefit Life Insurance Company in order to reinstate its mortgage, is that right?

A. That is correct.

Q. And you signed that deed?

A. Yes, sir.

Q. With that consideration?

A. Signed that deed.

Q. That was a transfer of the property subject to the Mutual Benefit Mortgage lien, wasn't it?

Mr. GARNETT: The deed itself shows what it was subject to, we object to that as calling for a conclusion.

The COURT: Let him state how he understood it, overruled.

To which ruling the plaintiffs at the time duly excepted and still except.

A. The deed was subject to that lien.

Q. The consideration on that deed together with the $73,000 due on the Mutual Benefit Mortgage at that time would constitute the total consideration for the property, wouldn't it?

A. Did not.

Q. I say that would be the consideration?

A. Did not form the consideration of that deed.

Q. I say for the property?

A. Not for the property, either.

199 Q. You don't think it did?

A. It did not, if I had I would never have executed it.

Q. You afterwards made this agreement, I will say of May 14th, the time for you to pay off the debt to the National Bank of Commerce due on the 14th day of May, was extended until some time in the fall of 1904, wasn't it?

A. No, sir, it was contracted by that second agreement, but the first agreement ran it to November 9th, that was our consideration of that deed, but the May 14th agreement, which your clients got up, contracted that four months to July 9th.

Q. You undertook within that time limit by that agreement to pay off this debt, did you?

A. I wouldn't say I undertook to do it, didn't undertake to do it.

Q. Another installment of interest fell due on the Mutual Benefit mortgage on the first day of July, 1904?

A. Yes, sir; it did.

Q. You didn't pay that, did you?

A. No.

Q. So that after the bank had paid up your delinquencies and restored the Mutual Benefit mortgage to good standing on May 14th, you made default again the following July, didn't you, on that mortgage?

A. I didn't pay the interest.

Q. Now, what you owed the National Bank of Commerce on that eighty thousand dollar note, when did you first make default in the payment of that?

A. Default in the payment of it?

Q. Yes, of that debt to the bank?

A. There was no default, rightly called default, until some
200 time perhaps in 1903, I can't exactly locate it, after I became embarrassed by the flood conditions. Prior to that I had kept up payment on it, and had it renewed, continued with the consent of the bank, and paid the interest promptly so there was no default until after that time.

Q. In 1903 Mr. Woods began to call your attention to your delinquency in paying the interest even on the debt due to the bank, didn't he?

A. I don't recall any particular date, but I kept the interest paid up until after June 1903.

Q. You didn't pay any interest after July, 1903, did you, you didn't pay the interest due in July, 1903?

A. I paid five hundred dollars on the principal and interest was paid out of the realization on a purchase money note up to September 20th, 1903, August 20th on one note.

Q. That wasn't paid at that time?

A. The five hundred dollars paid on the principal I paid that in cash myself.

Q. When?

A. I think it was in August, 1903, the date I can give you in a minute—I paid five hundred dollars on the principal of the debt

September 12th, 1903, ninety dollars paid on the principal, October 9th, 1903. The interest was paid up to August 20th, 1903.

* * * * * * *

Q. We were talking, Mr. Holden, about the condition of this large note that you had given to the bank, and I think I asked you when you first made default on that note—I will now
201 ask you if it isn't a fact that you paid the interest on this eighty thousand dollar note, the last interest you did pay, by executing a note to the bank for fifteen hundred dollars?

A. Yes, sir; that fifteen hundred eighty-six dollar note was for interest, I paid some money on that, though.

Q. I will ask you if on July 29th, 1903, you received a letter from Mr. Woods, president of the bank, which reads as follows: "July 29, 1903, H. M. Holden, esq., City, Dear Sir: I notice that you have not paid your obligation for interest, $1,586.85, past due since July 20th. Now, Mr. Holden, as much as I would like to do so, I must say to you that after August 5th, we will be compelled to take such action in the matter that will protect our interest. We will give you until August 5th to pay this interest note. If it is not paid we will then come to the conclusion that it is necessary for us to proceed so as to collect our interest and paper. I dislike very much to say this, it is unpleasant for me to do so, but I am president of the bank, I am responsible for results, and I must insist on payment of this note by August 5th. I have given you this time so that you can turn around and get the money. Yours very truly, W. S. Woods, President"

A. I may have done so, I don't remember now, I wouldn't say I did not.

Q. Have you such letter in your possession?

A. That letter, no, sir; and I haven't seen such a letter in the handling of letters in reference to this business. I have no recollection whatever of receiving that letter, but I would not say I did not receive it; there is no signature to it.

202 Q. No, that is a carbon copy. It is a fact, isn't it, Mr. Holden, that on July 29, an interest note of $1,586.85, which was due on July 20th, was in the hands of the bank and unpaid?

A. Yes, sir.

Q. And that was for the interest on your large note of eighty thousand dollars to the bank or some renewal of it?

A. Well, it was for interest on that note as the bank figured it up to the 17th of June, when they took a renewal for the principal.

Q. You gave this note for the interest?

A. That was for interest and a further discount on the note for thirty-three days.

Q. You paid no money then at that time as interest on this, but gave your note for the interest?

A. Gave that note for the interest and discount ahead.

Q. Now, you didn't pay that note, did you, $1,586?

A. I paid five hundred dollars in cash.

Q. When?

A. Paid five hundred dollars in cash September 12th, 1903, and

there was ninety dollars more endorsed on it October 9th, 1903, and interest on it to September 18.

Q. Dr. Woods and the bank were pressing you at that time to straighten up the back interest on the note, weren't they?

A. Oh, not very urgently, I can recall. It was understood, the condition was and I talked with them.

Q. I will ask you if on October 15th, 1903, following this, Dr. Woods didn't write you the following letter: "H. M. Holden, Esq., City—

203 Mr. GARNETT: We object to reading that letter in evidence.

The COURT: I don't see it will do any harm. To which ruling the plaintiffs at the time duly excepted and still except.

Q. (Continuing:) Dear Sir: Much as I dislike to annoy you I want to say to you now and probably the last notice, that if your matters are not cleaned up with us by the first day of November we will have to advertise and sell the property. Very truly yours, W. S. Woods, president." Didn't you receive that letter on or about the 15th of October, 1903, from Dr. Woods?

A. I have no recollection of having received such a letter and have not seen any such letter at any recent date but would not deny receiving it.

Q. I will ask you if on December 31st, 1903, you didn't receive the following letter from the manager of the claim department of the bank: "December 31, 1903, Mr. Howard M. Holden, Washington Hotel, City. Dear Sir: After I talked with you over the phone this afternoon I saw Dr. Woods and he went over your matters in detail. It looks strange to us, Mr. Holden, that with all the assets you have that this paper would not be kept in a live condition and it is unbusinesslike on your part to allow it to run along indefinitely in its present shape and therefore must insist on your making some arrangement by which you can at least take care of the interest on this loan. It has been running as you know, over two and one-half years with very slight reduction and we have received no in-

204 terest on same since last July. Therefore, I am authorized in saying that we will have to bring some action looking to the whereabouts of our collateral in the event that you can at least take care of the interest. We are willing to extend this loan and carry it along on the payment of the interest but that we must insist on being paid. I hope you will see that the matter is fixed up quickly in order to relieve us of considering it a bad debt as it will be when it has run six months. Kindly advise me when you will be able to take up the interest due and provide for renewal, otherwise I am afraid the matter will become embarrassing to each of us. Yours very truly."

A. I will give the same answer to that I did to the others, I don't remember.

Q. Now, I will ask you if on January 23, 1904, you didn't receive from the manager of the claim department of the bank the following letter: "Howard M. Holden, Washington Hotel, City, Dear Sir: Referring to my letter December 31st, I now beg to confirm the same

and to insist that some action be taken on that matter as I am absolutely directed to take measures to foreclose your collateral unless this matter is fixed up at once. In the absence of advice from you proceedings will be commenced looking to the collection of our paper by the foreclosure of the collateral. Respectfully yours, ——, Manager."

A. I have no recollection of receiving that letter but I wouldn't say I did not receive it.

Q. The facts are that during all this time you was largely
205 in default in the matter of this loan with the bank and not making any payments?

A. That was the situation from the summer of 1903 on for awhile except the five hundred dollars I paid in September, 1903, and some collections from the purchase money notes. (Record pages 549 to 566.)

Q. You requested the Bank of Commerce to pay up the bill to the Mutual Benefit Insurance Company and reinstate that mortgage, did you?

A. I don't think I did it in the way you put it, but it was up between us and doubtless considered for the mutual interest. I was desirous of having them do so and they were desirous to do it.

Q. You couldn't pay it?

A. I wasn't prepared to do it at that time.

Q. And it meant immediate foreclosure of this land?

A. It might have done so, I don't know about that.

Q. You couldn't even pay what you owed the bank on overdue interest and interest notes o nthe large loan which you owed the bank personally?

A. I wasn't able to at that time.

Q. You then represented to the bank that you could, that you had some chance to sell these lands as a body so as to save you some money out of the wreck and pay off all of their debt if you had time to do it, didn't you?

A. I wouldn't admit that I put it in that shape.

Q. That is substantially what you said to them, isn't it?

A. No, sir; I wouldn't admit that.

Q. That is what you thought, wasn't it?

A. I wouldn't admit that either. I represented to them——

206 Q. (Interrupting.) Then you continued these negotiations——

A. I was in full conference with them regarding the matter and they knew I was doing the very best I could and the effects of the flood were visibly passing away and I felt sure we could soon make further sales and that I could overcome these difficulties. I told them that and I was industriously seeking to make some good sales and could have made them that summer if they hadn't tied my hands.

Q. You was grateful to the bank for carrying you along and giving you time and helping you to carry this first mortgage?

A. I appreciated it.

Q. It was a very great kindness for you?

A. It was in their interest to do it as much as mine. I wasn't

afraid of the foreclosure as that takes a long while in Kansas, but if they cut the notes, I was afraid of it.

Q. Now, the bank didn't take advantage of your defaults which began early in 1903, kept carrying you along, even took a note for interest, didn't they?

A. Yes, to an extent; defaults didn't commence early in 1903.

Q. And finally in May, 1904, you came to an arrangement with the bank with reference to the payment of this debt you owed the bank and that agreement was embodied in the contract of May 14th?

A. No, sir.

Q. What was that contract of May 14th?

A. I have stated fully in my direct examination and I will repeat it if desired, how that Mr. Patton came to me early in May
207 with the statement that Dr. Woods had sent him there to say to me that unless I would change the form of the securities so that they would not be subject, if I continued in default, to a long foreclosure process under the Kansas law, that he would sell out the security under the power of sale contained in the notes, and presented me a paper, either at that interview or within a day or two afterwards, I won't say which, running to Dr. Woods and containing a transfer of the property to him in a stated period of time within which sale might be made and at the end of that period we would have an accounting.

Q. Irrespective of what he said you joined in the execution of this contract?

A. I would like to state what led up to it.

Q. I am not asking you now?

A. It is a continuous story and I can't in justice to myself, jump to either end of it.

Q. Now, Mr. Holden, a conveyance of that land would have had to have been made by the Holden Land and Live Stock Company, wouldn't it?

A. Yes, sir.

Q. And in order to do that it would require a meeting of the board of directors of the corporation, wouldn't it?

A. Well, such a meeting was had, if that is what you are getting at and a resolution passed. Judge Robinson made up his papers and they were complied with, regardless of their contents, finally.

Q. Hereafter you executed this deed, that is the Holden Land and Live Stock Company executed this deed in pursuance of that resolution?

A. Yes, sir; same day, May 12th.

208 Q. Now, Mr. Holden, that deed was deposited in escrow with Mr. Patton together with the other agreements and papers held by the bank, isn't that true?

A. I have no knowledge of that, it was delivered to the representatives of the bank on May 12th and I never saw it afterwards, when that was delivered to me.

Q. Now, the reason that you recorded that (the agreement of May 12th) was because you couldn't get any further extension of time of the May 14th agreement, wasn't it and because Mr. Patton

had delivered up the papers according to contract and the deed had been placed on record?

A. I considered the recording of that deed a violation of the understanding that existed between the bank people and myself, and while I didn't believe it meant anything hostile to me, I didn't like it and the first time I consulted with any attorney on the subject, and Judge Scarritt and on his advice wrote that addendum to it, the agreement of May 12th, and had it recorded so that there would be notice to everybody.

Q. You knew very well what the contract was and that it was just exactly as stated in that contract of May 14th, and you frequently made written acknowledgments that such was the contract, it was an absolute sale and that the Inter-State Trading Company was a purchaser?

A. I emphatically deny that.

Q. I will ask you if you signed this paper (handing witness paper is that your handwriting)?

A. That is an assignment of an insurance policy to the Inter-State Trading Company which I regarded as the mortgagee.

209 Q. I asked you if you signed that paper?

A. I did, the Holden Land and Live Stock Company.

Q. When did you sign it?

A. October 26th, 1904.

Q. That insurance policy was on buildings located on the land described in the contract of May 14th, 1904?

A. Yes. (Record 568 to 576).

Several other assignments of insurance policies of similar import were then identified by the witness and put in evidence. Resolution of Board of Directors of Holden Co. authorizing lease identified and introduced in evidence, as Exhibit 99, as follows:

"Resolved that the president of this corporation, Holden Land and Live Stock Company, be and he is hereby authorized and directed to lease from the National Bank of Commerce of Kansas City, Missouri, the land in Shawnee County, Kansas, which was recently conveyed by this corporation to the Inter-State Trading Company and by said company conveyed to said bank, for a term of one year, which term began on January 1st, 1905, and is to end on January 1st, 1906, at a rental price of Ten Thousand Dollars ($10,000) for said term, to be paid to said bank by this corporation on or before the 1st day of January, 1906; and it is hereby further resolved that the president of this company be and he is hereby authorized to enter into a written contract with said bank leasing said real estate for the time and on the terms above mentioned, said contract to contain such further provisions as may be agreed upon between said bank and the president of this company." (Record 584).

Witness then questioned regarding an alleged lease by the Inter-State Co. (not introduced in evidence) to one Noel to a part of the 110 acres in Jackson County, Mo., and states that Noel had been a tenant off and on of one of the houses on top of the hill and

210 further testifies. "I had been in possession of this land always before and after this year 1907, and during that year there, I so considered myself, at least, but Dr. Woods asked me in

the early part of that year to have Mr. Donnelly, who collected rents and did their real estate business, to receive those rents and turn them into the bank, I understood on my indebtedness and they are credited to my collateral account, so far as I can make it out, and I did so. I said I was perfectly willing to do it and he collected the rents and I had no knowledge of his making any lease. I still held possession of it." For the years following I made, leases myself with the parties, 1908. The main body was rented by Casper Herr who paid $250 rent that year. I had no knowledge of that being leased by them but they collected the rent. "I went out there frequently during that very year and looked after the situation." (Record 586-7).

Q. Now, Mr. Holden, you always charged commissions for the sales of these lands, didn't you?

A. No, sir.

Q. Commissions were always paid, weren't they?

A. Yes, but you say I charged them, that I deny.

Q. Who did charge them, who did collect the commissions, commissions were always paid?

A. I explained that fully in my testimony, too.

Q. I want to know how it happened that you claimed to have made these sales and commissions were paid on every sale?

A. I will repeat that explanation—testimony, as I gave as near as I can recall it.

Q. I want to ask you if commissions weren't paid by the bank on every sale that was made?

A. I wouldn't admit that, commissions were paid like they are on most every sale, paid out of the proceeds of the sale, paid
211 by me I calculated because I considered I was the mortgagor and the owner.

Q. The commissions were paid to the men who made the sale, were they?

A. Yes, sir, commissions were paid.

Q. Then if somebody else got the commission you didn't make the sale, is that right?

A. No, sir; that isn't exactly right. Whenever a man introduces a party to an owner of land, even if he goes no further than that he considers himself entitled to the commission and gets it. That is the rule of real estate exchange. I took up every one of these sales and did a large part myself, and Mr. Owens in carrying every one of them out.

Q. You made a statement to the receiver of the National Bank of Commerce, didn't you, while that bank was in the hands of a receiver with reference to the sales that had been made?

A. I think I did at his request.

Q. And costs and expenses?

A. I have got a complete statement of that, I made it at his request to Mr. Benton.

Q. I will ask you to examine this paper and state what it is? (handing witness paper).

A. I want to look at the addition to it since. There is a great deal of figuring on it since it left my hands. It is a list, that is the

typewritten part, is a list of sales made by me of these lands from January 10th, 1906, that is the date of the closing of the sales, up to the time of the failure of the bank, made at the request of Mr. Cutts, the receiver, and delivered to him.

212 Q. You say those sales were made by you?

A. By me and by agents behind me, made for me, every one of them.

Q. The costs of making those sales was in every instance, taken out of the purchase money of the sales, weren't they, every single instance?

A. The commissions were, but not the other costs in any case (Record, 587-589).

A statement made by witness to receiver of bank in December, 1907, identified and introduced in evidence (Ex. D. 100).

Q. I ask you Mr. Holden, to take that report that you made out which I have just introduced in evidence, and turn to the memoranda there of the sale of the east half of the southeast quarter of 6 and a part of the east half of the northeast quarter of 7 north of the Union Pacific Railroad, all in Township 11, Range 14, about 105 acres, and ask you if as a matter of fact that land was not sold October 21st, 1905, to I. H. Mitchell for $7,350?

A. It was.

Q. What did you report it as sold at?

A. $6,950.

Q. What became of the other four hundred dollars?

A. That has been fully explained. The consideration in that deed was $7,350, the other four hundred dollars was on account of four hundred dollars that I owed to Mr. Mitchell personally, myself, and was deducted from the purchase price, with the knowledge of the bank and its concurrence.

Q. Did you make a written statement on that to the bank

213 of that sale?

A. I would like to refer to that letter to Mr. Omar Robinson, it will be seen that I did.

Q. Of this sale?

A. Surely, a full statement of these commissions, too. Before doing so, as I understood all the proceeds were to go to the bank to apply as I supposed, on my debt, I spoke to either Dr. Woods or Mr. Rubey regarding that four hundred dollars, and that I owed Mitchell that much and I wanted it to come out and it was approved and the deed from the Interstate Trading Company, the consideration of it was $7,350. In the face of that the $6,950 was received without objection, and in my letter to Mr. Robinson which is here as an exhibit that is fully stated.

Q. Now, will you turn to the northwest quarter of the west half of the northeast quarter and the northeast quarter of the southwest quarter of 5-11-14, sold to J. C. McCoid March 1st, 1907, I will ask you if the consideration for that sale was not $7,368.60?

A. I think it probably was in the deed, but I want to explain that: That was the figure at which the land would amount to at thirty dollars per acre which was our list price. I spoke to Dr. Woods—I conceded on that price seven thousand dollars to McCoid

in consideration that there would be no commission to be paid, I made that sale direct to him myself—he was from Mt. Pleasant,—Iowa—with the co-operation of Mr. Owens, our man at the farm and as there was no commission to be paid as I expected and intended, he pressed me to reduce it to seven thousand dollars even and
214 I consented to that. And either he suggested it or I did—I was opposed to breaking in on our list price and I recollect speaking to Dr. Woods about it and suggesting that the full list price be put in the deed as a consideration. However that may have been, seven thousand dollars was every cent he paid for it and I can readily get his testimony to that effect.

Q. You did pay a commission on it, didn't you?

A. Yes, sir.

Q. Who did you pay that to?

A. I told Dr. Woods I had conceded to seven thousand dollars in consideration there would be no commission and expected there would be none. When I got up here early in March to close the sale, Mr. McCoid was here from Mt. Pleasant, Iowa—I found instructions in the hands of the Bank of Topeka, to whom the papers were sent, to require me to sign a receipt for the amount of what the commission would be, a receipt which the bank enclosed—Dr. Woods signed the letter himself, and the sale could not be closed, the transaction could not be closed under the instructions the bank had here without that being done so the commissions were taken out and are in my hands to this day, but I am not responsible for that.

Q. That is your explanation for that?

A. That is the truth of it (Record 597-599). Letter in question appears on page — of this abstract.

Q. Now, was Mr. Owens the manager out there?

A. Yes, sir.

Q. Was he not in the employ of the bank?

A. No, sir; emphatically no.

215 Q. Didn't he make expenses out there in the way of improvements on his own house he lived in and report the amount to the bank and get a check from the bank to pay it?

A. I know what you refer to. A tornado occurred up there along in October I think it was 1906, and swept through along about the line of the railroad, unroofed the depot, blew down a large corn crib we had there, made kindling wood of it and some other structures near by. I rebuilt one-half of that corn crib, we didn't need as large a corn crib, I rebuilt one-half of it at my own expense, used new lumber except such as might be culled out from the wreck, but didn't put any roof on it, which isn't necessary for ear corn, and we put the corn from that part of the place in that leaving the roof off. I was expecting to sell that tract of land pretty soon, so I didn't see the necessity as we probably would sell the corn in a month or so, of going to the expense of adding a roof, about sixty or seventy dollars. Mr. Wheeler, who was brought here from Oklahoma to take Mr. Rubey's place in looking after such matters as mine—he went up there a few days after his arrival in Kansas City, up to the farm on a morning train and back in the afternoon, and he saw this crib

that had between four and five thousand bushels of corn in it without any roof on it, so he took it upon himself to tell Owens to put a roof on or else wrote to him after he got back. Owens either sent me the letter or notified me and asked me what he should do. I told him it was a useless expenditure but if they wanted to
216 put a roof on for them to do it. That roof was put on and I never paid for it, didn't feel I ought to pay for it.

Q. Mr. Owens sent the lumber bill direct to the bank, the owner of the land at that time and they paid it, didn't they?

A. I guess they did but you can't find an instance where one dollar otherwise was ever paid by the bank.

Q. A great deal of this land was rented out to tenants who worked it on shares, didn't they?

A. Yes, sir.

Q. And they paid the rent in corn and oats and wheat and such things as that?

A. Yes, crop rent.

Q. Who saw to the gathering up of that crop rent?

A. Mr. Owens was on the place there for the general purpose of being the constant custodian of affairs, I was up there often looking after it.

Q. Whom did he report to?

A. To me.

Q. Anybody else?

A. I don't know who else there was to report to.

Q. What did he do with that stuff?

A. I converted it to money from time to time in such ways as seemed most advisable and paid the money over to the bank.

Q. You did?

A. Yes, sir.

Q. Don't you know that stuff was shipped direct to the bank at Kansas City?

A. I don't know when.

Q. Wasn't it shipped direct to the agent of the bank in Kansas City?

A. How much of it?

Q. Many car loads?

A. I would like to see some proof of it.

217 Q. Did you know anything about that?

A. No, sir.

Q. Never heard of it before?

A. I want to say this; Mr. Wheeler followed his trip up there by saying that that crib of corn should be shipped out shortly after, notwithstanding he had put this expense in the roof and he assumed to make a sale of it and did so and the amount is a credit to my collateral account. But that is the only instance they have ever dabbled in the crops up there or assumed to do anything with them that I know of.

Q. And if the bank didn't make settlement with these various tenants in this matter of crop rent and sent their agent up there who looked after them and made settlements with the tenants?

A. I am not knowing to anything of that kind. There is where the expenses of Wheeler to Kingsville was charged to me $5.90.

Q. When was that, do you know when it was?
Mr. GARNETT: At the time this corn was shipped?
A. June 4th, 1907, is a credit to that collateral account, 1907 sales of corn, 4142 bushels for $1923.80 credited to my collateral account.

GEORGE M. NOBLE, on behalf of plaintiff, testified (Rec. 613):

Direct examination.

Am 67 years old, lived in Topeka since 1870. In real estate, loan and insurance business. Been in loan business ever since have been in Topeka. Familiar with real estate values in Shawnee
218 County. Acquainted with Shawnee County lands in question since 1873. Acquainted with market value of that farm in May, 1904. Had occasion to estimate value of this Holden farm about that time. About 4900 and some odd acres—about 5000 acres. Estimated the value at that time at $220,000 or $225,000. Had the property listed on books for sale in separate tracts and as a whole from Mr. Holden. Have sold different tracts since then. Made one sale in 1906 to George C. Bills. Mr. Holden fixed the price. Never heard of any one else in connection with it, describes other tracts sold after that. Conferred with no one except Mr. Holden. He paid me the commissions. Did not pay him any part of them.

Cross-examination by Mr. DEAN:

Had disastrous flood in June, 1903, followed by another in 1904; result disastrous to lower bottom lands as to value.

Redirect examination:

In making my estimate of the value of the lands, took into consideration flood damages. Notwithstanding that, think estimate made a fair market value. Values had increased from 1901 to time of the flood.

JOHN HOWERTON, on behalf of plaintiffs, testified (Rec. 623):

Direct examination:

Lived in Rossville, this county and state, 28 years; stockman, farmer and real estate business. Acquainted with value of lands known as Holden Ranch ever since lived there. Fair market value of Holden ranch in May, 1904, about $45 per acre on the average. He and Mr. Williams made an estimate in separate tracts; figured up as a whole $221,982.42, as of May, 1904.

219 CHARLES D. WILLIAMS, on behalf of plaintiffs, testified (Rec. 627):

Am farming and in telephone business. Lived in neighborhood of Holden ranch 36 years; raised there.

Acquainted with market value of Holden ranch. Estimated the value of the ranch in separate tracts with Mr. Howerton at an average of $45 per acre, total of $221,982.42 in May, 1904. This was a fair market value.

I. L. BETZER, on behalf of plaintiffs, testified (Rec. 629):

Age 55, lived in Topeka 19 years, engaged in loan and surety bond business; loans money on farms. Acquainted with value of Holden ranch since 1900, when application for loan from Mutual Benefit Life Insurance Company was made through Bartlett Bros. of St. Joseph, Mo., as agents, visited, inspected and made estimate of value with Bartlett for loan. Was worth quarter of a million dollars at that time. Taking into consideration the effect of the flood and the general tendency of prices upward since 1901, thinks land was worth as much in May, 1904, as it was in 1901.

Cross-examination by Mr. DEAN:

The sale of lands was paralyzed for a while as the effects of the flood. The sale of bottom lands was stopped for a while.

J. D. MILLER, on behalf of plaintiffs, testified (Rec. 633):

Have lived in Topeka for about 20 years; engaged in the real estate business there for 17 or 18 years; acquainted with value of Holden ranch. Think land without buildings worth $40.00 per acre in May, 1904, lands worth more in 1904 than in 1901, general tendency for lands to increase. The flood did have a sort of shock and prevented people from buying lands that were flooded, especially those that were damaged; there were pieces here and there that were damaged, but where the flood came on and off, don't think there was any check in prices at all and they advanced from 1901 to 1904. There was a little check but worth just as much notwithstanding the flood. Uplands advanced.

220

Cross-examination:

Believes lands could be sold in 1904. There was market value for $40 lands when it wasn't washed or sanded.

J. W. THURSTON, on behalf of plaintiffs, testified (Rec. 639):

Have lived in Topeka 38 years. Am cashier of Bank of Topeka; correspondent of National Bank of Commerce of Kansas City, Mo. Produces and identifies letter dated March 5, 1907, to Bank of Topeka, signed W. S. Woods, president, relating to sales of land.

The COURT: Do you recognize that as Dr. Woods' signature?

A. I do; these notations were made by me, so I, of course, identify this absolutely.

Letter offered in evidence. Ex. C, 102, as follows:

National Bank of Commerce.

Established 1865.

Capital & Surplus $3,000,000.

Kansas City, Mo.

W. S. Woods, President.
W. H. Winants, Vice-President.
W. A. Rule, Cashier.
Chas. H. Moore, Ass't Cashier.
W. H. Glaskin, Ass't Cashier.
P. F. Covington, Ass't Cashier.

221 KANSAS CITY, MO., *Mar.* 5, 1907.

Bank of Topeka, Topeka, Kansas.

DEAR SIRS: I am enclosing you herewith a deed from the Interstate Trading Co. to Chas. C. Bradley, which is to be delivered to Mr. Bradley for $2,000.00 upon the following terms: Fifty dollars which has been paid to us, $450 in cash to you, and notes and mortgages as follows: One note due March 10th, 1909, $250.00, 1910, $250.00; 1911, $250.00; 1912, $750.00. There is also inclosed with this deed a quit claim release from the National Bank of Commerce. Mr. Howard M. Holden will call on you with the purchaser and present the notes and mortgages and will approve them. Out of the funds received you will please pay to Mr. Howard M. Holden the regular commission; i. e., five per cent on the first thousand and two and one-half per cent on the remaining thousands, taking his receipt, a copy of which I am inclosing. I am also sending you other papers a description of which follows, and for which I would be glad to have receipt for the commission from Mr. Holden in the above manner for each of the sales separately, of course, deducting, for all of this transaction, your fees, if any, before remitting us.

I hand you next a deed from the Interstate Trading Co. to J. Calvin McCoid, Southwest 32-10-14, purchase price $4,400.00 on the following terms: Cash to you $800.00; five notes $660.00 each, five years from date, $3,300.00, has paid the bank $300.00, total $4,400.00. Please pay Mr. Holden the regular commission, taking his receipt as above mentioned.

I also inclose you another deed from the Interstate Trading Company and release quit claim from the National Bank of Commerce to J. Calvin McCoid, to be delivered on the following terms; purchase price $7,000; cash to you $1,250.00, four notes $1,000.00 each, has paid us $500.00, total $7,000.00. Please pay the regular commission to Mr. Holden as above mentioned.

222 There is also a deed from the Interstate Trading Co. and a release and quit claim from the National Bank of Commerce to Henry J. La Fontaine for the East half of section one, township 11, range 13, purchase price $11,990.00, upon the following terms;

has paid us $500.00, cash to you $7,990.00, mortgage and notes $3,500.00.

I wish to say in connection with all these papers that Mr. H. M. Holden will be in Topeka at the time of their delivery and the transaction, so far as the mortgage and notes are concerned, will be governed by him, but he will deliver the mortgages and notes to you to be returned to us in the regular way and the commission on the last named transaction shall be in the regular way with the separate receipt taken, as I have indicated above.

Thanking you for your prompt attention, I am,

Very truly years,

W. S. WOODS, *Pt.*

P. S.—We enclose a sample of a receipt to be used for the commissions paid Mr. Holden. Please use this exact form of receipt in every case and see that they are all signed by Mr. Holden only.

W. C. STEPHENSON on behalf of plaintiffs, testified (Rec. 644):

Have lived in Topeka, Kansas, all my life. Engaged in real estate and loan business. Familiar with value of lands in the county and with Holden Ranch at Rossville, about 15 or 20 years. In July, 1905, was employed by defendant bank to inspect the ranch and report to them the value. Inspected it in July, 1905, and made a report to bank. Estimated different tracts. Thinks value in 1904 same as 1905. The estimate reported to the bank was $211,166.00, made at the request of bank.

Cross-examination:

Q. As a matter of fact did not these floods render the bottom land along the Kaw River, subject to these overflows practically
223 unsaleable?

A. Well, no, having reference to this ranch, there was some land lying along the river there that it was true had overflowed although it added nothing to the conditions the 1903 flood left in it, in fact the 1904 flood helped some land by reason of the low tide and where the flood, where the current was swift in 1903 across some farm land it was back water and allowed silt to settle. I remember when I visited that land there was quite a large tract there along the river that the silt had settled over and made it useful again for farming purposes.

Q. Was not the lands in the valley of the Kaw River that were submerged by these floods greatly damaged as to market or saleable value in May, 1904?

A. There was some land of that particular ranch right along the river there that had been smothered with sand, and in some places a few inches deep, which of course retarded its value to some extent, but in the main it hadn't injured the market value of the land.

Q. Isn't it a fact that these lands were practically unsaleable in May, 1904—I mean lands that were flooded?

A. Well, I shouldn't feel that way about it, the lands that were

damaged in the 1903 flood were not hurt by the 1904 flood, in fact it was an advantage to a great deal of it by the collection of silt.

Redirect.

Thinks 60 or 70 acres along the river slope damaged, but it still had value for farming purposes.

A. W. KNOWLES, on behalf of plaintiffs, testified (Rec. 650):
Have lived in Topeka for about 50 years—banking business about 20 years. Acquainted with values of real estate in county and Holden ranch. Appraised it for loan of Mutual Benefit Life Ins. Co. in 1901. Identified original appraisement made by him. Valued land at $40.00 per acre without improvements. Valued im-
224 provements separately. Thinks that was fair market value. Land worth more in May, 1904, than when he appraised it. Gradual increase in values, steady advance.

Cross-examination.

Q. As a matter of fact, did not these floods render the bottom land along the Kaw River, subject to these overflows, practically unsaleable?

A. Well, I would say about that, that the flood had a tendency to check up the sale of land in the bottom, but the land—because a land is overflowed, it didn't hurt the land any except that that was gouged out by the current as it did in many places, cut out great big holes, and in other places swept sand on over good land, those lands were absolutely damaged, but the mere fact of the water going over land and receding, why, at the present day it has been a benefit to the land, but at the same time it did have a tendency to check up the sale of land for a couple of years—got bravely over it now, though.

Q. Was not the lands in the valley of the Kaw River that were submerged by these floods greatly damaged as to market or saleable value in May, 1904?

A. There was only—there might have been some of the low lands, the lowest of them, the 1904 flood wasn't nothing like the 1903 flood.

Q. Isn't it a fact that these lands were practically unsaleable in May, 1904, I mean the lands that were flooded?

A. Well, as I said a while ago, there was a check up in the sale of land which lasted for a couple of years probably, but the land wasn't damaged any, only those that were dug out and washed over again with sand, there was more or less of that. A man's property was worth just as much, that is, I mean that that wasn't physically damaged.

JOHN H. LIPSCOMB, on behalf of plaintiffs, testified (Rec. 654):
Live in Kansas City; 60 years old. Born in Jackson County, Missouri. In real estate business. Acquainted with real
225 estate values in and around Kansas City, Mo., and with the 110 acres in suit. Worth from $400 to $450 per acre in May, 1904.

Cross-examination:

Known the land for 12 or 15 years. Enhanced in value since 1904 quite considerable. There was a market value in 1904. Bases his judgment on what land was selling at then.

L. T. HERNDON, on behalf of plaintiffs, testified (Rec. 675):

Have lived in Kansas City, 29 years. In real estate business since 1885. Acquainted with real estate values in and around Kansas City. Acquainted with 110 acres claimed by Mr. Holden, known as the Bayse property, out southeast part of city. Know market value in May, 1904—worth $350 to $400 per acre at that time. Know the Brush Creek Coal Mining property was connected with it. Worth $10,000 in May, 1904, probably more than that I am putting it conservative.

LEANDER J. TALBOTT, on behalf of plaintiffs, testified (Rec. 680):

Have lived in Kansas City, Mo., since 1857, was mayor of Kansas City 1884 to 1885. In real estate business. Acquainted with value of 110 acres in May, 1904; worth from $300 to $600 per acre then.

Cross-examination:

Only been familiar with values in a general way of late years.

Redirect:

Think the principal value of the property that it can be used for manufacturing purposes. Recollection is there are about 70 acres of bottom land and the upland is suitable for residence purposes.

226 It is above high water mark and on high grade. It is good switch property. The Belt Line R. R. runs through it and there are the Mo. Pac. and Frisco Railroads near by.

A. A. WHIPPLE, on behalf of plaintiffs, testified (Rec. 684).

Have lived in Kansas City, Mo., 34 years. Engaged in real estate business for about 30 years. Several times president of the Real Estate Exchange of Kansas City. Familiar with values in and around Kansas City. Makes specialty of Blue Valley lands. Knows value of 110 acres in question. Fair market value of that 110 acres in May, 1904, $300 to $350 per acre; about 3-5ths of it bottom land suitable for switch purposes, balance nice undulating ground.

Plaintiff introduced in evidence Section 3705 of the Revised Statutes of Missouri of 1899; also Section 3706 and Section 3711 of said Revised Statutes, which are as follows (Rec. 657):

SECTION 3705. When no rate of interest is agreed upon, six per cent allowed as legal interest. Creditors shall be allowed to receive interest at the rate of six per cent per annum when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts and on accounts after they become due and demand of payment is made; for money recovered for the use of another and retained without the owner's knowledge of the receipt; and for all

other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

SECTION 3706. Parties may agree, in writing, for interest not exceeding eight per cent. * * * The parties may agree, in writing for the payment of interest not exceeding eight per cent per annum on money due or to become due upon any contract.

227 SECTION 3711. Interest may be paid on interest—shall not be compounded oftener than once a year. Parties may contract, in writing, for the payment of interest upon interest; but the interest shall not be compounded oftener than once a year. Where a different rate is not expressed, interest upon interest shall be at the same rate as interest on the principal debt.

Copy of petition of George T. Cutts, receiver of defendant bank for order of sale of real and personal property put in evidence as Exhibit C 104 (Rec. 657) (caption omitted):

To the Honorable Circuit Court of Jackson County, Missouri:

Your petitioner, George T. Cutts, respectfully shows and represents that the National Bank of Commerce of Kansas City, Missouri, is and was at all the dates and times hereinafter mentioned, a corporation, duly organized and existing under and by virtue of the National Banking Laws of the United States as a National Bank; that on the 5th day of December, 1907, said bank suspended and ceased to do business, and thereafter, on the 16th day of December, 1907, your petitioner was duly appointed receiver of all the assets of said bank by the Comptroller of the Currency for the United States; that he then duly qualified as such receiver and ever since then has been and still is, acting as such receiver, and as such receiver, is now engaged in winding up the affairs of said bank. That among the assets of said bank are the lands hereinafter described:

Then follows description of many tracts not involved in this controversy which, the receiver says, "appear to stand of record in the name of said bank" including tracts "in litigation between Joseph K. Davidson and others" and said bank. Your petitioner further states that the Inter-State Trading Company * * * holds

228 the legal title to all the lands in this petition hereinafter described, but that said bank is beneficially interested in said property, to-wit:

Then follows descriptions of many tracts, among them the lands in Jackson County, Missouri and Shawnee County, Kansas, which are involved in this controversy, with the statement following each of the last named tracts that the titles thereof are now in litigation in a suit between Holden Land and Live Stock Company and Others, Plaintiffs v. Inter-State Trading Company, and said Bank and Others, Defendants."

Also a certain promissory note dated January 13, 1905, for $75,005.97, made by James A. Patton, payable to said bank on demand with interest from maturity at eight per cent per annum, interest paid to November 30, 1907, secured by note and mortgage of

Holden Land and Live Stock Company, which are involved in said litigation between the Holden Co. and said Inter-State Co.

Also notes made by said Inter-State Trading Co., amounting to $145,170.80 of principal, a list being attached marked "Exhibit A."

That said receiver has an offer of $400,000 from Terrace City Realty and Securities Company for all the right, title and interest of said bank and said receiver in and to all said property, real estate, said notes of said Inter-State Co. and said Patton and the collateral security thereto belonging, which offer has been approved by the Comptroller of Currency and said receiver believes for the interest of the estate should be accepted, but does not warrant or guarantee the title to any of said property, but sells only the right, title and interest of said bank and of said receiver. And said receiver asks for an order of said court authorizing him to make such sale.

In said appended "Exhibit A" among the other notes of said Inter-State Trading Co. is one "November 12, 1904, payable one year, $87,096.70, reduced by payments to $19,000, said note bearing interest from date at the rate of eight per cent per annum payable annually."

Said petition was signed and sworn to by said receiver on 23d March, 1908.

229 Defendants then recalled HOWARD M. HOLDEN for further cross examination who testified:

Cross-examination by Mr. DEAN:

Added statement to the agreement of May 12, 1904, and sent to the register of deeds to be recorded. There was no question between witness and the bank about what the contract was for; that it was simply a change in the form of the security from a mortgage to a deed. That was his understanding and he supposed it was the intention of the bank. Did not give a new note except the $6,253 note. They already had note. There was no occasion for new note, they kept his other note for $77,000.00 and that together with the $6,300 note covered the whole indebtedness. They had not purchased the Mutual Benefit note at that time. There was no provision that they should. I was still liable on that. Bank had not advanced any taxes at that time.

Q. Did you not think it was funny for them to make this change in the form of the security?

A. I thought the whole transaction was funny, but it was what they asked for and Mr. Patton explained why they wanted it, to get away from the bad laws of Kansas relating to foreclosures. He explained that the land would be tied up for three years if the note was not paid and they had to foreclose.

"Thought in face of their recording deed and I not having anything to do with that, that I ought to put on record my own understanding of the matter." Did not know that that was not
230 the bank's understanding of the contract; sometimes when people have others in their grip, they try to tighten up on

them. Bank advanced the money on Mutual Benefit loan for its own interest as well as mine. I did not consider I was relieved much. They would have to foreclose under the Kansas law and did not have the grip on me that the bank had under that contract (Rec. 687-691). Didn't try to borrow the money from anyone else. Don't know whether he could have done it or not. Signed the lease because Mr. Patton said they wanted it in that shape so that the revenues derived from the property would be applied to the debt (Rec. 697).

Deposition of DAVID L. BARTLETT, Jr., on May 6th, 1909, at office of Bartlett Brothers in St. Joseph, Mo., before B. B. Hooper, Notary Public, on behalf of plaintiffs, read in evidence. He testified as follows:

Am 50 years old, lived in St. Joseph about 35 years; was an employee of Bartlett Brothers; four years ago the business was incorporated under the title of Bartlett Brothers Land and Loan Company of which he is secretary and treasurer; his duties were to examine securities for loans and attend to the business in parts of Kansas. The firm was lending between $2,500,000 and $2,800,000 in Missouri, Nebraska and Kansas. Was familiar with values of real estate in Kansas. In 1900 Holden Land and Live Stock Company made application for loan on 5,000 or 6,000 acres of land in Shawnee County, Kansas. Witness handled the application. Examined the land on two different occasions, first with I. L. Betzer of Topeka in August, 1900, and afterward with a director
231 of the Mutual Benefit Life Insurance Company; the loan was completed in July, 1901, and taken by said Insurance Co. My estimate of the value of the land exclusive of buildings, was $225,000 and the buildings $15,000, total $240,000. Thought and still think that a fair and reasonable value of the real estate at that time.

In summer of 1902, on payment of $3,000 on said mortgage the S. ½ of S. W. ¼ of Sec. 2, T. 11, R. 13, was released by said Insurance Co. In March, 1903, at said Holden's request, witness made the following estimates of the values of the lands for the information of the Insurance Co. which was then considering Mr. Holden's request for other releases.

Then follows detailed valuations of 48 separate divisions of said lands in parcels of 175 acres and under, aggregating 5501 99-100 acres and $237,371.90 total value. Witness states that his valuations were conservative and somewhat under those of Mr. Holden and the appraisers. The Insurance Co. used his valuations as a basis for making releases after that time. Witness says that "Taking the land as a whole it was worth fully as much after the flood of 1903 as it was prior to the flood. All lands in this part of Kansas had advanced in value in the twelve months from 1902 to 1903. The flood unquestionably hurt the selling price of bottom lands along the Kaw River, but it did not take long to discover that the bottom lands had really not been hurt much by the flood, and as

the uplands had produced good crops and prices were good,
232 they had continued to advance in value. More than half of the Holden lands were unaffected by the flood, so that on the average, these lands were worth fully as much after the flood as they were before.

Q. On May 12th, 1904, what, in your opinion, was the fair and reasonable market value of the separate tracts of land described above in your testimony?

A. I should say that the bottom lands were not worth any more than the values I placed upon them in 1903, but the uplands were worth more.

NOTE.—This deposition in the Record immediately precedes the beginning of the testimony (page 60 of this abstract) and was marked Exhibit C2 by the stenographer.

Plaintiff- rested their case with exception of witnesses to be used by permission of the court.

Defendants' Evidence.

ELIJAH ROBINSON, on behalf of defendants, testified:

Direct examination:

Represented National Bank of Commerce in transaction. "I did not draw contract dated May 5th. I do not know who drew that one, probably Mr. Patton. It was presented to me but it was not in proper form and did not represent what the agreement was. I had had a consultation with Dr. Woods and Mr. Patton about the matter before and I did not approve of the contract and I could not consent to it, to having it signed. I then prepared the con-
233 tract that was signed on May 12th" (Rec. 700-1).

Q. You may state how you happened to insert the provisions that are embodied in that contract?

A. I have talked with Dr. Woods about the matter and I have talked with Mr. Holden and Mr. Patton about it and the fact had been discussed that Mr. Holden's company was in default.

Counsel for plaintiffs objected to any testimony of any conversation had by the witness with Dr. Woods and Mr. Patton unless it is shown that Mr. Holden was present.

A. I did not intend to state anything that passed between Dr. Woods and myself. I said that we had a conversation about the matter and then I met Mr. Holden and Mr. Patton afterwards in my office.

THE COURT: Mr. Patton and Mr. Holden were there together?

A. Yes, sir, and the facts were all talked over. I cannot at this time remember the exact language, we understood that the Insurance Company's mortgage was in default and that the note was in the hands of some attorneys in Topeka, I don't remember who they were, but they were to bring foreclosure proceedings unless the interest and taxes were paid. Mr. Patton and I said to Mr. Holden

that we were not willing, representing the bank, to advance any more money in the present condition of the matter, but if he would make a deed to the bank we would advance the money and
234 give him six months as agent for the bank to sell the land, that we were not willing to accept anything but an absolute deed, but would appoint him as an agent for the bank to sell the land within six months and give him all that he could realize above the bank's debt as a commission for selling the property. We told him that the bank had made the same sort of an arrangement with William Umphrey on a ranch down in old Mexico.

Q. What, if anything, was said by Mr. Holden about his ability to sell this property within sixty days?

A. At the time this deed was executed Mr. Holden signed this contract and the deed was made to the Interstate Trading Company. The bank didn't want to carry this as real estate and the Interstate Trading Company was a corporation that was organized for the purpose of doing this kind of business for the bank. The bank practically owned all of the stock and controlled the Interstate Trading Company. Instead of making the deed to the bank it was made to the Interstate Trading Company, and the Interstate Trading Company made a note to the bank for the amount that was due from the Holden Land and Live Stock Company and Mr. Holden. Mr. Holden said when he came to execute and deliver the papers that he thought if he had sixty days he could sell that property for enough to pay the bank and maybe something more. Thereupon we consented that Mr. Holden might make a note for the amount which the bank was advancing to pay the Insurance Company something over $6,000.00, and put that note and Mr. Holden's other
235 note and this agreement whereby he was appointed agent for the bank, and the deed to the Interstate Trading Company and the note of the Interstate Trading Company to the bank in the hands of Mr. Patton to be held in escrow until some time in July, my recollection is that it was for sixty days. I was busy at that time and it was impossible for me to prepare this escrow agreement, and I prepared it in a day of two afterwards, and I think it was signed on the 14th, and as soon as I had time to prepare it, all the papers, two notes and the deed and the agreement appointing Mr. Holden as agent and the note of the Interstate Trading Company to the bank were all placed in Mr. Patton's hands (Rec. 702-3-4).

Q. I will ask you if you afterwards saw Mr. Holden in reference to the leasing of this property by him?

A. Yes, sir.

Q. Did you talk with him anything about the lease?

A. I told him I wanted him to make a lease and if he wanted to lease it we wanted a written contract to that effect.

Q. What did he say?

A. He and Dr. Woods agreed on the terms. I don't know whether I got it from him or from Dr. Woods, but I prepared a lease and presented it to him. Holden never said anything in my hearing or presence that bank was not the owner of the land (Rec. 705).

Witness says that some time after expiration of agency agreement, Mr. Holden said to him that he thought the bank ought to
236 let him have whatever could be realized from the property above the indebtedness and asked him to intercede with the bank to that effect, and he told him he would. Never had any further conversation with him about it until two or three days ago (Rec. 706).

Q. Now if you have anything further that I have not inquired about I wish you would state it?

A. That escrow agreement expired in July, it was renewed until September 1st, I think it was the first of September, and then it was renewed again until sometime in October, I think the 11th of October, and Mr. Holden asked Mr. Patton and myself to extend it again and we refused to do so, we would not extend it any further. Mr. Patton said to Mr. Holden at that time, I will give you your note and deliver it to you. Mr. Holden said he hadn't time to wait for it now, he says, I will come and get it some other time.

Q. He said that in your presence?

A. Yes, in the directors' room in the bank.

Q. In connection with these extensions, did you have to do with each one of them?

A. I don't know whether Mr. Holden and I had any conversations about them or not, but I prepared the forms to be endorsed on the contracts for Mr. Patton (Rec. 707).

Cross-examination.

Q. You had nothing to do with the getting up of the assignment contract on May 5th?

A. I don't think I did, that is my recollection of that matter now. It is pretty hard for a man to recollect now that far back, but I don't think that I had anything to do with that; I think Mr.
237 Patton or Mr. Holden must have gotten that up. Thinks the contract of May 5th must have been presented to him between May 5th and May 12th (Rec. 708-9).

Q. You don't remember of having any conversation with Holden at all before this contract was brought to you, the contract of May 5th?

A. No, sir, I don't remember having any conversation.

Q. Up to the time of the agreement of May 5th, up to the time it was presented to you, you had no conversation with Mr. Holden?

A. I don't remember of any, the matter as I remember it now was with Dr. Woods, he told me that the agreement had been made with Mr. Holden.

Q. In the preparation of this agreement you received instructions from Dr. Woods?

A. I received the information from Dr. Woods and from Mr. Patton and from Mr. Holden as to what the agreement was to be, and then I prepared the agreement as I thought it ought to be. I can't say that I was instructed by anybody. I don't generally take instructions from very many people (Rec. 710-11).

The note of the Inter-State Co. to the bank was for same amount

as the Holden debt and the bank carried it as bills receivable (Rec. 714).

Q. Did the Interstate Trading Company pledge to the bank any security for the note of $82,000.00?

A. No, sir; but it belonged to the bank, why should it pledge any security to the bank?

238 Q. I am asking for the facts?

A. Not that I know of, there was no security to be pledged, the Interstate Trading Company afterwards made a deed to the bank.

Q. When was that deed made?

A. I cannot remember, but I think it was right away after the deed to the bank was made, so they would have the title to the land, I will tell you why I say that, in that lease which I prepared there is a recital that the Interstate Trading Company had deeded that property to the bank, I would not have made that recital if it was not done. I cannot remember when it was done, I know it was done or I would not have made that recital in the lease.

Q. If the Interstate Trading Company made a deed to the bank it was prior to February, 1905, when that lease was made?

A. Yes, sir.

Q. Have you been the attorney for the bank since that time up to this date?

A. Yes, I told you that.

Q. I will ask you if after February, 1905, if the bank carried this real estate as real estate or bills receivable?

A. I don't know, but I think it was carried as bills receivable.

Q. What evidence have you outside of that recital in the lease that the Interstate Trading Company ever deeded this land to the bank?

A. I have looked for a bundle of papers that the bank had, Mr. Rubey had them afterwards, and I have been unable to find them: I have no independent recollection of the deed having been made, I simply have that recital in the lease. It was not an un-

239 common thing for the bank to take title to the Interstate Trading Company or to Mr. Winants or to Mr. Rule or to somebody connected with the bank of real estate which they had to take in payment of debts owing to the bank. The invariable custom was to take a deed from these different people to somebody in the bank and hold it without putting it on record. They didn't think there was anything wrong about it, it was nobody's affairs except the bank's and the people who gave the deed, and the title was in the bank just the same as Mr. Winants took the title to the property that Mr. Holden owned in Jackson County, the 110 acres, he took the title to that land in the first place from Mr. Holden for the benefit of the bank.

Q. Do you have any recollection of the deed from the Interstate Trading Company to the bank?

A. No, sir, it is only a circumstance (Rec. 714 to 716).

Q. Is it not a fact that the deed and this contract were all signed on May 12th and the deed acknowledged on May 12th, and if the

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papers were not delivered in your office, the deed to Mr. Patton and this contract to Mr. Holden?

A. Why do you ask me that question when I just told you I could not tell you?

Q. You don't remember when this contract was delivered to Mr. Holden?

A. I don't remember whether it was delivered May 12th or May 14th. I remember the circumstance of Mr. Holden saying that he didn't want it put on record and Mr. Patton and myself consented to this escrow agreement.

Q. That is the contract of May 12th, I call your attention
240 to the fact that the date is written in ink, May 12th?

A. Yes.

Q. And some other of this writing is written in ink, in whose handwriting is that?

A. That is, Mr. Patton's handwriting, I think (Rec. 723).

The Interstate Trading Co. never advanced any money for interest and taxes to Mutual Benefit Co., as recited in the contract. Didn't pay any money that day. "It is a fact that they never paid any money for anything. I have told you it was simply used for the purpose of holding this title, that the Interstate Trading Company didn't advance any money at all" (Rec. 725).

Q. I want to ask you something about that agreement of May 14th.

A. I will be glad to answer any questions.

Q. You said something about Mr. Holden saying he thought he could sell this land in sixty days?

A. Yes, sir.

Q. In this agreement of May 12th, according to its terms he is given six months, do you remember that he was given to November 9th?

A. Yes, sir.

Q. And the contract of May 14th would shorten that period four months?

A. I think it is a self-evident proposition that the 9th of July is sooner than the 9th of November.

Q. Was it at Mr. Holden's request that the time was shortened from six months to two months?

A. Yes, sir.

Q. He requested that himself?

A. Yes, sir.

241 Q. Where was he when he requested that?

A. I can't say whether it was in the directors' room of the bank or in my office. I have already stated to you and I don't know whether you understood it or not, but I will try and make you understand it this time that this first contract, the one that gave Mr. Holden the right as agent of the bank to sell on or before a certain day in November, was a different contract from the escrow contract. When the first contract was drawn the deed was to be put of record, when the second contract was drawn Mr. Holden didn't want it put of record, he said it would hamper him in the selling

of this property, he said he thought he could sell it in sixty days if the deed was not put on record, therefore, we wrote the escrow contract putting these papers in Patton's hands to be held until some time in July, at that time if Holden continued or if he hadn't sold the property Mr. Patton had the right to deliver the deed to the Interstate Trading Company or the bank and put the deed of record, and this other contract would be of no force until in November (Rec. 725-6).

Q. I understood from your testimony that the papers were executed in your office. Up to May 12th when you were called on to prepare these papers, had not the negotiations between Mr. Holden and the bank terminated at that time?

A. I don't know that I was called on to prepare them on May 12th.

Q. When you were called to prepare them, didn't you know that the negotiations between the parties were at an end, that they
242 had agreed among themselves and that they had simply called on you to prepare the papers?

A. I was a part and parcel of the negotiations, the transaction would not be put through unless I approved of it, but I don't remember now. I can't for the life of me remember whether I talked with Patton and Holden or not, I do know that the first contract was not satisfactory to me and that I prepared the second contract, I know I prepared the other contract and it was approved by Mr. Patton and Mr. Holden. Mr. Patton didn't have much to do with the approving of it, however.

Q. I am not asking about the papers nor the form of the contract, I am asking you about the negotiations that led up to this transaction, if you had any part in those negotiations?

A. I probably did have.

Q. Do you remember of having anything to do with these negotiations?

A. I don't remember of anything that took place between Mr. Patton and Mr. Holden and myself at that time. You see I have more than one case and I can't remember to save my life the details of that conversation. I would simply remember the results and the conclusions that we arrived at.

Q. You don't remember any price being fixed on the land in Shawnee County, Kansas?

A. I told you that a minute ago, I never heard anything said about the price except that it was deeded to the bank in payment of the debt which Mr. Holden owed the bank.

Q. Did Mr. Holden tell you that, that it was deeded to the bank to pay this debt?

243 A. Mr. Holden agreed to make a deed and sign the contract that has been put in evidence, I can't remember distinctly any conversation.

Q. We are looking behind that, at the real talk between the parties, the negotiations that culminated in these papers?

A. I cannot remember anything about it, about the details of any particular conversation, except that I know that the contract and

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the deed was prepared and the contract was prepared and I talked to Holden and Patton about it, and this deed and the contract were executed in pursuance of the conversation that we had, and I think if anybody else would undertake to swear to any more he would be telling a lie (Rec. 731).

Q. You don't remember anything about any conversations leading up to these transactions?

A. Do you want me to repeat what I have already said?

Q. Not necessarily?

A. I don't think it is necessary for me to do so either.

Q. You said something about Mr. Patton saying to Mr. Holden that he would get those notes and deliver them, do you remember where that conversation occurred?

A. Yes, sir, it occurred in the directors' room of the bank.

Q. Do you remember what that was?

A. I cannot say that it was the exact date of the last extension of that escrow agreement or not, but it was about that time. Mr. Holden wanted another extension and Mr. Patton and I would not consent to it. Mr. Holden said to Mr. Patton that he was
244 going to file that lease, that he was going to file that deed, and he was going to deliver the Interstate Trading Company's note to the bank, in other words he was going to comply with the agreement, and he said to Mr. Holden, I will get your note and deliver it to you, and Mr. Holden said he was in no hurry and he would get it some other time.

Q. Mr. Holden didn't take the note at that time?

A. No, sir, he did not.

Q. You said something about preparing a lease in February from the bank to Mr. Holden; who requested you to prepare that lease?

A. My recollection is that Dr. Woods requested me to prepare it.

Q. Did you prepare the lease in the fall before that to run from the Interstate Trading Company to Mr. Holden?

A. I don't remember; I might have done so (Rec. 732).

Redirect examination (Rec. 733):

Mr. Holden wrote letter to Mr. Winants requesting him to deed land which stood in his name as security for certain indebtedness, to the Interstate Trading Company. Mr. Holden said that putting the deeds on record might interfere with his selling the land under this agreement which would expire in November and that he would be glad if we did not put the deed on record and in pursuance of that suggestion, this the escrow agreement was made (Rec. 733-5).

Recross-examination.

Q. If you understood at the time that Mr. Holden was conveying this land for the payment of his debt, why did he give his
245 note for a part of the debt?

A. Because of the escrow agreement.

Q. Is it not a fact that the whole transaction was closed May 12th and this escrow agreement was an after consideration?

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A. No, sir, it is not a fact.

Q. Didn't you testify that Holden came to you and didn't want this deed called for in the May 12th agreement to be put of record, and then you suggested after he wanted two months in which to sell this land?

A. Yes, I testified that when we went to pass the papers before they were executed and delivered, that Mr. Holden said he didn't want this deed put on record and he asked for sixty days' further time, and I suggested this escrow agreement which he agreed to and I took time to prepare it and it was prepared and executed on the 14th (Rec. 737).

Q. You know as a matter of fact that Holden's debt was not paid on May 12th or the 14th?

A. You are asking for a legal conclusion, this was paid when these papers were delivered.

Q. You mean in October?

A. Yes, that is my legal conclusion about it, if that is what you want to know.

Q. In other words, on May 12th Holden's debt was not paid?

A. On May 12th his debt was arranged by agreement and it was renewed by that agreement at that time.

Q. You are dodging the question now?

A. No, sir, I am not dodging, it was not paid May the 12th.

246 Q. It was not paid on the 14th, was it?

A. I will not answer that question because the facts are before the court.

Q. It was not paid on the 14th, was it?

A. No, sir, not in the sense of being paid absolutely.

Q. Nor on the 16th?

A. No, sir, not in the sense of being paid absolutely.

Q. The contract of May 14th provided that Holden should have time of sixty days to pay this debt?

A. That contract speaks for itself and I don't see why you ask me to explain it to you.

Q. Do you remember that the deed to the Interstate Trading Company was delivered on May the 12th, the deed from Holden delivered on May 12th?

A. It was delivered to Mr. Patton.

Q. He was representing the bank at that time?

A. I don't remember whether he was or not, I cannot remember whether they were left with Patton that day or whether they were left the day that the escrow agreement was signed.

Q. You never saw any of the papers put into Mr. Patton's hands?

A. I was there, but I can't remember seeing the papers handed to him.

Q. Did you see any of the papers handed to him that you remember of now?

A. I just said that I can't remember of seeing it, I can only tell in a general way what I remember about it.

Q. The deed from Mr. Winants to the Interstate Trading Com-

pany was not put into Mr. Patton's hands at that time,
247 was it?

A. I can't remember whether it was or not.

Q. The letter from Mr. Holden to Mr. Winants was prepared by you?

A. It may have been, if it was not I ought to have prepared it (Rec. 738-740).

Q. In these contracts you made no provision whatever by which that title should go to Holden in case he paid his debt, there was no provision for his getting that land?

A. You will have to look at the contract to see whether there is or not.

Q. I thought maybe you had some explanation of it?

A. Mr. Winants was to hold the contract just as he did before, he held that deed as security for the indebtedness. Mr. Holden was like a good many other people, he didn't like to make a mortgage, and so he made an absolute deed instead (Rec. 741).

The COURT: Do you want to be understood in saying that you never knew of any claim of Mr. Holden's that this was not an absolute deed during these negotiations?

A. I never knew of any claim of his that this was not an absolute deed until after this suit was brought, never in my life before.

By Mr. GARNETT:

Q. You hadn't talked with Mr. Holden or anybody else about it, you lost track of the transaction after it was closed up, didn't you?

A. I didn't lose track of it, I didn't have anything to do with it, I don't know why in the making of the deed and releases and so forth, Mr. Holden after he requested me, wrote the letter to
248 me, asked that quit-claim deeds be made I never had any connection with him any further. Why he went to Mr. Winants and Mr. Robinson about the matter instead of Dr. Woods or myself I don't know. I was the attorney for the bank.

Q. You had no conversation with him about it afterwards?

A. No, sir.

Q. As to whether he claimed it was a mortgage or a deed?

A. No, sir (Rec. 742-3).

J. W. RUBEY, a witness, called on behalf of the defendants being first duly sworn, testified as follows:

Direct examination:

Q. Was you the claim agent of the bank having in charge the claim of the bank against Mr. Holden on a certain note executed by him to the bank for something in the neighborhood of eighty thousand dollars and secured by collateral note of eighty-two thousand dollars executed by the Holden Land & Live Stock Company?

A. I was in 1904.

Q. In 1904?

A. After the escrow agreement I think had expired.

Q. Did you have anything to do with it prior to that time?

A. I think not.

Q. Now, when did you come into possession or into control of that claim on behalf of the bank or rather, when did it come into your hands for attention?

A. Well, it was after Mr. Patton's sickness which was '94, I believe.

Q. 1904?

A. Yes, 1904.

249 Q. I notice, Mr. Rubey, that there was an account carried in the books of the bank, the first entry of which is June 9, 1905, can you tell the court how that account happened to be kept by the bank?

A. Yes, sir.

Q. Please do so?

A. Well, in order to, after accounts were placed in my hands for collection and adjustment, in order to keep the funds straight and to credit them on the property which we had acquired in payment of debts we designated the money received in a collateral account and the collateral account was marked, the name of the party who we would acquire the property or stocks or assets from and of the assets we sold the money was credited to that account and then we had any substantial sum, a thousand or two thousand, we applied it on the debt.

Q. What was the custom of the bank with reference to acquiring real estate, would it take the title to the real estate in its own name or in the name of subsidiary corporations or some individual?

Mr. GARNETT: We object to that, he hasn't stated he knew what the custom of the bank was.

The COURT: If you know.

A. Yes, sir.

Q. State?

A. The custom is to open a collateral account.

Q. I know but what is the custom as to taking the title of real estate, what was the custom?

A. The custom was to take title to all real estate or to purchase all real estate in the Interstate Trading Company's name.

250 Q. When a piece of real estate was taken in payment of a debt due the bank was the title to that property taken in the Interstate Trading Company?

A. Yes, sir.

Q. And how was the debt, that is, the assets, carried on the books of the bank proper?

Mr. GARNETT: We object because the bank records show how the account was carried.

The COURT: That is not the best evidence.

Mr. DEAN: I am asking for the general custom.

A. The general custom was for the Interstate Trading Company to give their note for the amount of the indebtedness to the bank and the bank carried that note in its bills receivable (Rec. 744 to 746).

Remembers collateral account of Howard M. Holden. The funds

as they accumulated in that account were applied on the notes which the Interstate Trading Co. gave for the property (Rec. 748).

Mr. Holden came in and said he wanted to lease the property. We agreed to lease it to him for $10,000 a year. Made contract for sale of lands. Don't remember the date, but Mr. Holden couldn't sell the land as an entire tract, as a whole, so we had a man at Topeka go over the land, subdivide it and put prices on it. It might have been Mr. Stephenson. Anyhow, a chart of that land was made out in different pieces; 80, 160 and 240 acres priced. "That was shown to Mr. Holden and he said he would undertake to sell land in such tracts as he could on a basis of five per cent commission on the first thousand and two and one-half per cent for each ad-
251 ditional thousand and he proceeded to sell it, we holding him and making him get the price above what the land was valued at." He never made any claim to me that he was the owner of the land or had any interest in it. That relation continued for a year or so. Sales started in July. Left the employ of bank in October, 1906. Never knew of Mr. Holden's making any permanent improvements. J. H. Wheeler succeeded him (Rec. 750 to 753).

The COURT: When was it that you say this arrangement by which Mr. Holden was to sell the land was entered into as near as you can remember, when did it begin?

A. I think it must have been around in June, May or June, 1905, because I think our first sales were made in July.

Q. And you left the bank when?

A. 1906, October (Rec. 754).

Cross-examination:

Am Dr. Woods' son-in-law. Never had any title as claim agent in the bank until after Mr. Patton's death. Opened up collateral account when he got into bank. Sales closed up while he was there.

Q. Do you know anything about the details of closing up any of these sales?

A. Yes, sir, we closed up a lot of them.

Q. Do you know who made deeds to the property?

A. Yes, sir.

Q. Do you know the Holden Land & Live Stock Co. made deeds to the property?

A. No, sir.

252 Q. You don't know that fact, do you—don't you know the Holden Land & Live Stock Co. made deeds to every one of these tracts that was sold?

A. They may have given a quit-claim deed.

Q. Do you know that to be a fact, do you know whether they did or not?

A. Yes, sir, they did.

Q. You remember that now, do you?

A. I think they did.

Q. Did you ever see one of those quit-claim deeds from the Holden Company to the Interstate Trading Company?

A. No, sir, I don't think I have.

Q. Did you ever see one of those deeds made to the purchaser?
A. I think I have.
Q. If they had no particular interest in it didn't it strike you as remarkable these deeds should have to be made from the company to close these trades?
A. I never saw the deeds of the Holden Land and Live Stock Company except one or two were returned to me after the trade was closed.
Never inquired why they were made (Rec. 755-6-7.)
Never had an interview with any purchaser. Mr. Holden furnished abstracts. Don't think the bank paid for any abstracts. Think the chart was prepared by Mr. Stephenson. Paid him and charged it to the collateral account. Charge collateral account $15.00 W. C. Stephenson guess that is the entry (Rec. 760-762).
Q. You were never up to see that land?
A. No, sir.
Q. You had nothing to do with fixing prices at all as claim
253 agent for the bank at which they should be sold?
A. No, sir.
Q. Now, Mr. Rubey, you told the court a while ago that Mr. Holden came to you and said he wanted to lease that land, now when was that?
A. I can't tell just offhand.
Q. In what year was that?
A. I think it was 1905.
Q. What time of year was it?
A. It must have been in the fall, I think the lease was made in the spring.
Q. Fall of 1905?
A. I think that was the date.
Q. Now, who was present when Mr. Holden came to you in the fall of 1905 and said he wanted to lease that land?
A. No one that I know of.
Q. No one present?
A. I think not.
Q. Where were you when he said that?
A. I presume I was at the bank.
Q. Don't you know where you were?
A. I couldn't tell you right now where the conversation was held, I presume it was at the bank (Rec. 762-3).
Q. Mr. Rubey, you said that the proceeds of the sale of that land was credited on the Interstate Trading Company note, was that right did I understand you right on that?
A. Yes, sir.
Q. That is, when you made a sale after the expenses you credited the net proceeds on that note?
A. No, credited it to the collateral account.
Q. I thought you said you credited it on the Interstate Trading Company note?
A. No, credited it to the collateral account and as that
254 account grew in any amount, thousand or two or three thousand, why we credited even thousands on the note always.

Q. On the Interstate Trading Company note?
A. I think so, yes, sir.
Q. Did the Interstate Trading Company pay you as claim agent for the bank, a single dollar on that note?
A. Did the Interstate Trading Company?
Q. Yes?
A. No, sir.
Q. Didn't pay you a penny on that note, did it?
A. No, sir (Rec. 765-6).
Q. Do you know where that opening entry came from June 9, 1905, $743 (in collateral account)?
A. No, I don't. I expect it is corn on the lease rental. It might have been, I don't know.
Q. The Interstate Trading Co. didn't pay it to you, did it?
A. No, sir.
Q. Holden paid it to you in some way, didn't he?
A. Not necessarily, it either came out of land sold or from land lease money, that is my recollection (Rec. 767).
Have no idea why he charged Mr. Holden $57.92, on July 12th, 1905. Have no record to show. Turned over to his successors original vouchers as to all charges when Mr. Wheeler took charge. Can't explain items of collateral account. "Am not the man that had charge of the books at all, the bookkeeper kept the books" (Rec. 768 to 772).

Questions by Mr. GARNETT:

Q. Mr. Rubey, in this collateral account of Howard M. Holden, is a charge on July 12th, J. W. Rubey, $57.92, do you know what that was for?
255
A. Not unless it was some expense connected with it in some way.
Q. With the collateral account?
A. Yes, sir.
Q. Why did you charge that, J. W. Rubey, that something that you paid out yourself?
A. I think so.
Q. Do you remember what that was you paid out at that time?
A. No, sir, I do not, if my memory is right, I saw that on the statement, it seems to me like it was some advertising bill.
Q. That was the advertising bill, Mr. Rubey, was it not, of the trustee's sale on the Corrigan mortgage, wasn't it?
A. I believe it was, yes.
Q. You paid that and just charged this collateral account with it, didn't you?
A. Yes, sir, if that was the item.
Q. Now then, Mr. Rubey, you called upon Mr. Holden individually to pay that amount, didn't you?
A. Yes, I guess I tried to get it out of Mr. Holden.
Q. You called on him to pay that out of his own funds, didn't you?
A. I say I tried or asked Mr. Holden to pay it, I guess.

Q. That was for advertising the sale of the Jackson County land under the deed of trust, wasn't it?

A. I think so.

Q. Why did you call on Mr. Holden to pay that?

A. Because it was his indebtedness.

Q. That was indebtedness secured on the Jackson County land, wasn't it?

A. Yes, sir.

256 Q. Which you say was Mr. Holden's indebtedness?

A. He made the indebtedness.

Q. You didn't pay or the bank didn't pay that indebtedness when it became due, did it?

A. No, I think it was later on they took it up.

Q. And by reason of the bank not paying that they advertised it for sale?

A. The holder of it did, yes, not the bank, the person that held it.

Q. The holder of the note?

A. Yes, sir.

Q. You called on Mr. Holden to pay it and he did pay it, didn't he?

A. I don't remember, the statement will show it.

Q. You don't remember now personally whether Mr. Holden paid that or not, do you?

A. No, sir, I do not.

Q. He may have paid it and may not so far as you know?

A. Yes, sir.

Q. If that was Mr. Holden's individual debt why was it put in this collateral account if this collateral account didn't relate to Mr. Holden's indebtedness?

A. Simply because we paid the money out for that advertising bill and we had to have some account to charge it from.

Q. But I say why did you charge it to Mr. Holden and charge it in the collateral account if this collateral account wasn't Mr. Holden's account?

A. Simply because we had the title to that property in the name of Mr. Winants and if the first mortgage was not protected and the bill paid it would have been foreclosed, the account would be wiped out.

257 Q. That isn't what I asked you—if this collateral account is in there simply as a method of keeping the transactions between the bank and its assets, why in this account do you put an item which you say Mr. Holden was personally liable for.

A. Put in that account to simply show it was done in connection with the Holden deal.

Q. And a charge against Mr. Holden?

A. Charge against the collateral account of Mr. Holden.

Q. Do you say that charge was made against Holden and you called on him to pay it?

A. I asked if he expected to reimburse what I had paid out, and if I could get the money out of him I wanted to get it (Rec. 772-775).

Q. Now when did Mr. Patton die?
A. I think he died in the fall of '95.
Q. 1905 you mean?
A. Yes, sir, 1905.
Q. The lease you spoke of being executed to Mr. Holden was in February, 1905, that was before Patton died, wasn't it?
A. I couldn't tell you about that, I don't remember, I don't remember just the date.
Q. The fact of the business is, Mr. Rubey, that lease proposition had all been arranged, papers all signed up before Mr. Patton died?
A. I couldn't say.
Q. And before you came into the management of this claim department?
A. That may be so.
Q. I think you testified yesterday something about a conversation with Mr. Holden in regard to selling these lands up there, can you tell when and where that conversation took place?
258 A. I think it must have been in the Bank of Commerce at my desk, that is where we usually held our conversations.
Q. Can you tell about the time it was?
A. No, sir, not particular because we talked a number of times.
Q. When did you first talk with Mr. Holden about selling these lands?
A. I couldn't say.
Q. In what year?
A. I presume it was in 1905.
Q. Do you know what year it was in?
A. I do not, we sold them in 1905, so I think it must have been 1905.
Q. Don't you know, Mr. Rubey, that the arrangement with Mr. Holden for selling these lands was made with Mr. Patton before you came in there?
A. He may have had some arrangement.
Q. Don't you know that when you came into that claim department that Mr. Holden was then actively engaged in finding purchasers for that land?
A. He may have been, I don't think he had sold but very little land if any, up to that time.
Q. The time you came in?
A. Yes, sir, I am not certain of that.
Q. You think he had negotiated some sales up to that time?
A. Yes, sir, I believe he had.
Q. Up to the time you came in there?
A. Possibly had not closed them.
Q. And they were closed up after you came in there?
A. I think so (Rec. 776-7).

Omar E. Robinson, attorney, was employed by the bank to
259 look after these matters and closing of sales (Rec. 777).

Didn't know anything about the protection to Shawnee County land that was needed from the Kaw River. Never investigated it at all.

Never saw the lands. Did not know number of houses and improvements on them. Never sent anyone there to look after them or to see what repairs or protection against overflow was needed. Never went out to look after Jackson County 110 acres. Never saw the land. Thinks it near Sheffield. Never made any inquiry about its condition. Don't know whether there were any improvements. Never took possession of the 110 acres while he was claim agent. Never tried to rent it to anybody. Never looked after the taxes. Don't remember whether they were paid or not. Have no idea about taxes on the 110 acres. Has no recollection about taxes on Shawnee County land. Very indistinct recollection that they paid some taxes after they became due (Rec. 778 to 780).

Q. Why didn't you pay them when they became due?

A. Well, I don't remember that.

Q. You speak of the custom of the bank to pay taxes on the property; wasn't it the custom to pay taxes when they became due and avoid heavy penalties?

A. Yes, it was.

Q. Why didn't they pay them in this case?

A. I don't know, because they didn't get around to it.

Q. Do you know what arrangements were made with Mr.
260 Holden about selling those lands?

A. What arrangements?

Q. Yes, of your own personal knowledge now?

A. Yes, sir.

Q. That arrangement was made before you came in there, wasn't it, with Mr. Patton?

A. I don't remember just who made the arrangement but he was given a map of the land to sell at certain prices.

Q. Have you got that map?

A. No, sir, I have not.

Q. Where is that map?

A. I had one map and turned it over to Mr. Wheeler, my successor.

Q. I will ask you if it isn't a fact, Mr. Rubey, that Mr. Holden himself, fixed the prices on these different tracts of land on this map and didn't simply ask the consent of the bank to make releases of these different tracts when he sold them?

A. No, sir.

Q. Didn't Mr. Holden have anything to do with the fixing of the prices on this land at all?

A. After we had the land examined by some man up there and priced Mr. Holden may have made his own list and that list of his might have been agreeable to us, I can't remember just how the prices were finally determined on.

Q. But you didn't have that land priced by Stephenson until July, 1905, did you, that is the date which you made the payment to him?

A. Yes, that is about that time.

Q. Now long before this hadn't Mr. Holden already an arrange-

ment by which he was selling these lands and at that time
261 contracted to sell some of the lands?

A. I stated that was the arrangement he had with Mr. Patton.

Q. Who fixed the prices on the land sold up to that time?

A. I don't know.

Q. You don't know what arrangement Mr. Holden had with Mr. Patton about selling these lands at all, do you?

A. No, except we valued the whole tract at a certain price and dissected it and allowed him to sell off small pieces at certain prices.

Q. You valued it—how did you value that land you never saw?

A. Mr. Stephenson gave us a value on it.

Q. Do you remember how much that valuation amounted to?

A. No, sir, I do not.

Q. Do you remember it amounted to over two hundred thousand dollars?

A. I don't remember the figures.

Q. Have you any idea, could you come within a hundred thousand dollars of the price put on that by Mr. Stephenson?

A. I think his value was around two hundred thousand.

Q. Around two hundred thousand dollars?

A. Yes, sir.

Q. And you considered that a conservative valuation didn't you, and so expressed yourself to Mr. Stephenson in a letter?

A. I don't remember.

Q. Did you consider that a conservative valuation?

A. We took the valuation.

Q. Did you consider it a conservative valuation of the land?

A. Yes, I guess we did.

262 Q. Mr. Holden was not employed by you or by the bank through you to look after that land up there, was he, and watch it and look after the tenants on it?

A. He leased the lands.

Q. I say he was not employed to watch after the land?

A. No, sir.

Q. He was not employed by you to put any improvements on the land, was he?

A. No, sir.

Q. He was not employed by you to protect the land from overflow and look after the drainage ditches and things of that sort, was he?

A. No, sir.

Q. You never made any suggestion to him of that sort, did you, Mr. Rubey?

A. I don't remember of it.

Q. Mr. Holden was not employed by you to pay—to look after that land and sell it to pay all the expenses of closing sales, was he?

A. He was not employed to do it, he was given a commission for selling it.

Q. Did you mean by that commission he was to pay all expenses?

A. Yes, sir.

Q. Pay for the abstracts, is that right?

A. I don't know whether that detail was arranged, he was to get so much commission for selling the land.

Q. Was he employed to sell that land and pay for the abstract that was made, was anything said about that at all, do you know?

A. I don't know as that was agreed on, the abstract part of it (Rec. 781 to 784).

Never asked Mr. Holden for a statement of amount he was paying out for abstracts, for recording title deeds, or straightening up titles or any expenses he had been to in making and
263 closing sales of the land. He never insisted on our paying any of these expenses (Rec. 785).

Q. Mr. Rubey, you knew of your own personal knowledge, didn't you, that the commissions for the sale of these lands were paid to other agents in Topeka?

A. No, sir, I did not.

Q. You didn't know that?

A. No, sir (Rec. 786).

Q. Mr. Rubey, you knew that Mr. Holden was paying out large sums of money on that land such as repairs and drainage ditches and protecting the overflow from the Kaw River, didn't you?

A. No, sir, I didn't know what he was paying out (Rec. 787). Knew there was a flood but never investigated to see whether it was necessary to do anything to repair the damage (Rec. 787-8).

Redirect examination:

Q. During this time that Mr. Patton was sick and incapacitated who did his work and what was your duties in the bank?

A. I did his work.

Q. And with reference to the real authority, in whom was that vested?

A. Vested in me (Rec. 789).

Q. Now, Mr. Garnett asked you if you had anything to do with fixing prices for the sale of lands, you may state what the facts are regarding that, I understood you to answer him that you had nothing to do with the fixing of prices, now have you any explanation to make about that?

A. In the fixing of prices I usually talked the matter over with Dr. Woods and we arranged a price which we thought would
264 let us out on the property which we acquired and which the property was worth. He had no authority to sell or allow to be sold for less than the price we agreed on.

Q. When you said you had nothing to do with the fixing of prices what did you mean?

A. I meant in that cross examination that Mr. Holden may have made those particular prices on his sheet which he presented to us and they may have been acceptable to us, we might not have made those figures, he might have made them and presented them to us and they were acceptable to us and we let him sell for those figures (Rec. 793).

JAMES H. WHEELER, on behalf of defendants, testified:

Employed by bank in 1907 to do the work Rubey had done. Took charge of most of the real estate owned by the bank. Don't remember when the lease was made, it was made for a year and that year hadn't expired when I first saw it. Lease identified by witness. Thinks rent was delinquent. Came across the lease two years after it was made, but never seen anything on the books where the rent had been paid in full. Sold some corn down there assisted by our man, Jerry Owens. Also think Mr. Holden assisted me. When corn was sold credited to collateral account of Holden. Did not go up to the land to ship the corn. Don't think corn was shipped in his name. Put roof on corn crib. Collateral account paid for improvement. Didn't visit land on any other occasions. Paid taxes under receivership. Remained in the employ of receiver until bank reopened (Rec. 795-802).

Shipping receipts introduced in evidence.

265 Cross-examination.

Questions by Mr. GARNETT:

Q. Mr. Wheeler, the expenses that were paid out of these shipments was simply taken out of the amount of sale?

A. Yes, sir.

Q. You didn't pay that individually to Mr. Holden?

A. Why, Mr. Holden drawed a draft to the bank, he took it out first, he made me do it, and those cases I wouldn't—it would be paid by Mr. Holden, it would be taken out of the proceeds, that is net proceeds, if anything was taken, if I had sold anything direct, if I did, that would have to be paid——

Q. (Interrupting.) So you didn't pay Mr. Holden any of these expenses you speak of in this connection, you never paid Mr. Holden that?

A. I think not.

Q. That was simply taken out of the proceeds of that shipment?

A. I don't think I ever paid Mr. Holden.

Q. And you simply deposited the net amount there after these expenses were paid?

(No answer.)

Q. Mr. Holden simply turned over to you the balance of that, didn't he?

A. That would be my recollection of it, of the transaction, yes, sir.

Q. You speak of a draft for the full amount, Mr. Holden didn't receive any draft from the bank for that?

A. No, sir.

Q. He collected the money from the party to whom the shipment was made?

A. Yes, sir.

Q. And he brought that money less these expenses and turned

it over to you and you gave him credit for it, is not that
266 true?

A. Gave the collateral account credit for it (Rec. 823-4). Found there had been a tornado there. Didn't find any other buildings or improvements that needed repair. Only house he examined was what they called the home place. Did not see any other houses. Did not look around to see whether any other house needed repairing. Did not examine the matter of drainage and ditches and overflow. Made report that improvements were in fair condition. Arrived at the farm before noon. After dinner drove around with Mr. Owens, and returned on afternoon train. Mr. Owens told him he was employed by Mr. Holden to look after the place. Was never there before or after to look after the land. Did not discuss with Mr. Ownes what had been or would be necessary to repair the damage done by the flood (Rec. 828 to 833).

Q. You were informed by him in that conversation that they had been taking care of that proposition, weren't you, in repairing the damage, making ditches and things of that sort?

A. Mr. Owens didn't inform me anything of that kind.

Q. You knew they had been to considerable expense in that way, didn't you, Mr. Wheeler, did you make any inquiry about that at all?

A. There was someone else told me once or twice but not Mr. Owens (Rec. 834).

Didn't say he made any arrangements to have any corn shipped on that trip. "The corn that was shipped, all I can remember of, Mr. Holden shipped down here."

Q. Mr. Holden shipped all of it down?

A. Barely possible I shipped some but I don't think so (Rec. 835).

267 The map of the lands which he had spoken of was furnished by Mr. Holden. Bank paid no part of cost of rebuilding the crib, excepting the roof (Rec. 837).

Never looked into the matter of taxes when employed by bank or until after the bank went into the hands of a receiver. They were not paid when they became due. Some of the property had been sold for taxes. Suppose Mr. Holden called his attention to the taxes when he was acting for the receiver (Rec. 838-9).

Think there were five or six sales of land while he was with the bank.

"Mr. Holden and the agents at Topeka" negotiated the sales and attended to closing them up and mentions Mr. Noble of Topeka particularly. Says he never paid Mr. Noble any commission. "All of that matter was managed by Mr. Holden" (Rec. 840-1)

Never made inquiry how the abstracts were being furnished (Rec. 844).

HOWARD M. HOLDEN, recalled for further cross examination on behalf of defendants, testified:

Questions by Mr. DEAN:

Q. I want to know what taxes you claim to have paid on the Shawnee County land, for what year and the particular description of the land on which you claim to have paid the taxes?

A. I have here receipt No. 2685 of the Treasurer of Shawnee County for the taxes of 1906 on southeast quarter and east half of the north half of the southwest quarter south of the railroad less thirty-one acres of section 1-11-13 for $63.83.

268 Q. If they are described in the exhibit it will do just as well?

A. It is all described in exhibit C-55.

Q. Did you pay all the taxes stated in those exhibits?

A. I did, they are all in my name and I paid the amount of these receipts myself and the aggregate of them is $367.46. They are all for taxes of 1906 I believe.

Q. Are these lands on which these taxes are paid as you say as shown by this exhibit, still owned by the Holden Land & Live Stock Company, I mean are they still unsold lands?

A. If you will allow me to look at them I will designate if any are not (witness examines paper).

A. (Continuing:) They have all been sold.

Q. When were they sold?

A. At different times.

Q. Contracted for and practically sold at the time these taxes were paid?

A. Some of them were and some I think not.

Q. Do you claim to have paid these taxes out of your own money?

A. I did and nobody else.

Q. How did you pay it, did you give a check for it?

A. I think so.

Q. Have you got the voucher or check that you made?

A. Not with me, but I can abundantly authenticate what I am saying.

Q. Did you receive this money back in any settlement you made?

A. No, sir, I did not, $1.00.

Q. From Mr. Patton or Mr. Wheeler?

A. No, sir, not from anybody.

Q. Did you deduct it out of what you owed the bank for rent in any settlement you made?

A. Didn't owe the bank any for rent, didn't deduct it out of anything except out of my own pocket.

269 Q. What time do you claim to have paid this?

A. Three of the receipts are dated December 20th, 1906, and one March 7th, 1906, another March 9th, 1906, another December 17, 1906. You will not find them in the list you have, taxes that were paid for 1906.

Q. Why didn't you pay all the taxes if you paid those?

A. For the reason that I didn't have the money. I wasn't so abundantly supplied with money, ready money, that I didn't pay up. I intended to pay them all as fast as I could.

Q. How did it happen you picked out these particular pieces and paid taxes on them and didn't pay taxes on the balance of the land?

A. I think because some of them I had already contracted to sell and had other tracts there with immediate prospects of selling shortly.

Q. They were taxes that were paid as connected or incident to the expense of the sale of these lands, weren't they?

A. I wouldn't so regard paying taxes, expense of the sale.

Q. You paid them because the property was sold or contracted for and you knew that a title would have to be made, is that it, and the taxes cleared?

A. That may be but I will have to take a little time to examine each of these descriptions and receipts and then to recall the sales that were on hand or in prospect of being made at that time, at the various dates, which I can readily do by taking a little time.

Q. Do you claim to have paid any taxes on the 110 acres of land in Jackson County, Missouri, any time in your life?

A. Yes, sir.

270 Q. Will you state when you paid them?

A. I have a receipt which I will produce tomorrow. I had no notice of any of these inquiries, I supposed you were through.

Q. You was going to testify about this in your rebuttal, were you?

A. I probably will.

Depositions of W. S. Woods, Elijah Robinson and Omar E. Robinson on behalf of defendants, were taken in Kansas City, beginning 20th November, 1909.

Deposition of WILLIAM S. WOODS offered in evidence by defendants.

Testified on behalf of defendants.

Direct examination:

President of National Bank of Commerce during the year 1901 and from that time until 1907.

Remembers making loan to Mr. Holden in 1901. Took his note for $80,000 (Dep. 2).

Q. I will ask you, doctor, if you remember what date was fixed between yourself as president of the bank and Mr. Holden for consummating this loan?

A. There was considerable talk and trading in the matter. It was a big block of money, and I told Mr. Holden that we would have to agree upon a date on which the matter should begin to draw interest, whether consummated on that date or not, and it was agreed on, and just exactly what that date was now I could not remember without looking at the records, but it was some date

271 previous to the date of the note. I would like to state here—it will do no harm, I guess—that it was my custom never to promise money unless I had something for the promise; that is to say, if I promise money to-day, I make a man pay interest from to-day, whether he took it to-day or not; it made no difference when

the note was due, I made him pay interest. I always felt that was a fair proposition.

Q. Do you remember the rate of interest agreed upon to be paid for the use of the money?

A. I think it was eight per cent; the books will show.

Q. Mr. Holden has testified that on the date that this $80,000 note was made he was required by the bank to pay $426.67 as interest on the money for a period previous to the date of the note. I would like to have you state if such sum of money was required to be paid by Mr. Holden, and if it was, under what arrangement or agreement it was paid?

A. It was paid under the arrangement I have just stated, that the money was drawing interest from the fixed period agreed by him and myself, not with reference to the date of the note, and this is supposed to be the interest from the date of the agreement and the time the note is dated.

Q. Now, I will ask you to state what you can remember about the status of this loan from time to time until the spring of 1904?

A. It ran along from time to time and it was renewed, the details of which I could not give you without reference to the books of the bank.

Q. What rate of interest was charged on the note?

A. Eight per cent.

272 Q. Well, you may go ahead and state now what finally developed out of this transaction and what, if anything, Mr. Holden did towards paying this loan off when it became due?

A. Well, in the first place, it was renewed a good many times, the details of which I think the bank books would show, better evidence than any memory I could give in that matter, until finally we got tired, interest was not being paid, the debt was increasing and from our standpoint not getting any better.

Q. You may state what, if anything, occurred with relation to the first mortgage on that land in Kansas?

A. Well, there was an insurance company had a first mortgage; the amount of it I might not state correct, however, and I will not; I guess you can find the note in evidence.

Q. Yes, I was not asking for the amount. I wanted to know what was being done by Mr. Holden in reference to the note, and keeping up the taxes on the land?

A. Well, that note made trouble. The interest was not being paid on the note. The taxes were not being paid on the land; and the insurance company was urging payment, and went so far as to put it in the hands of an attorney in Topeka for foreclosure. That came to us, and Mr. Holden came to me and talked to me about it, and wanted me to furnish the money to pay up the interest and pay up the taxes, representing that if that was done that other parties would stand still. I said to him, no, I would not do that unless my condition was made better, nothing in it to me, been waiting

273 for the money a long time, and not getting anything, I was tired. I thought about the matter and came to the conclusion that it would probably be to our interest to let the Insurance Company go ahead and close up the mortgage; it would save us

trouble, and we could buy just as well at a sale under the first mortgage as going to the trouble of foreclosing our mortgage. I really thought it was a favorable circumstance to us that they should commence action. I declined to do anything unless a readjustment was had to my satisfaction. It resulted in us paying up the interest and the taxes and taking title to the property.

Q. Now I wish you would state——

Mr. GARNETT: Just a moment. I move to strike out the answer of the witness as not responsive, and as being a conclusion and not a statement of any facts.

WITNESS: The facts are just these, Mr. Garnett.

Mr. GARNETT: You can answer his question.

WITNESS: Well, put your question.

By Mr. DEAN:

Q. I was going to ask you to state what you did then in the way of turning the matter over to the attorney for the bank for adjustment?

A. Why, I agreed to pay up those taxes and interest if he would make title; I turned it over to Judge Robinson to clean it up and take the title; and a note was taken for the interest, and advanced the money for taxes.

Q. I wanted to get you to state what Holden agreed to do, what he said to you that he would do when you told him that you must have title?

274 Plaintiff's counsel objected to the question as calling for the conclusion of the witness.

(Question read by the notary.)

A. I told him I would not pay that interest and taxes unless he gave us title; that if I had to commence to foreclose my mortgage, the sooner I got about it the better, unless I was put in a better condition and given title, I would not do anything; he agreed to it and it was turned over to Judge Robinson to take title.

Q. You say he agreed to it. I would like to ask you to state what he said.

A. He said he would do it.

Q. Then the matter was turned over to Judge Robinson?

A. Yes, sir.

Q. I will ask you to state what the Interstate Trading Company had to do with acquiring of title to this property?

A. The Interstate Trading Company was a small company organized by the National Bank of Commerce as a holding company to be used as a matter of convenience and from time to time did hold titles for us.

Q. Then the taking of title by the Interstate Trading Company was for what purpose?

A. For the purpose of taking title to the National Bank of Commerce, we owned the company.

By Mr. GARNETT:

Q. You mean by that, the bank owned the company?

A. The bank owned the company (Dep. 3 to 7).

Leased the land to Mr. Holden for 1905 for $10,000. Don't think he paid all the rent. He said I had gotten all out of it that he did.

275 Never stated to him all I wanted was interest. He never referred to transaction as a subsisting debt (Dep. 6). "He wanted to rent it for the next year." I was satisfied all I could get out of it was what Mr. Holden could get out of it, so I made a verbal lease to him on shares, let him run it another year" (Dep. 10). Didn't know Mr. Holden paid any money toward building dam as a flood water preventative or that he paid out any money for improvements or surveyors (Dep. 10).

Q. You had an arrangement, doctor, with Mr. Holden in regard to the sale of some of these lands?

A. Yes.

Q. Now, you may state what conversation you had with Mr. Holden with reference to the selling of those lands in parcels or parts?

A. I had a map of the land, and set down the name and prices on it, in Mr. Holden's presence, and agreed that he might sell it at those prices and retain five per cent commission, but the price was to be net to us, we paying nothing for any abstracts nor anything, except the five per cent commission.

Q. Now what, if anything, did Mr. Holden say about intending to make sales upon those conditions?

A. He said he would do it.

Q. Now that was five per cent on the first $1,000, 2½ per cent after that, was it?

Mr. GARNETT: I object to that question as leading. The witness has already testified.

A. I think that was the fact.

276 Paid Mr. Holden commissions, cashiers' checks introduced in evidence. Bank paid all the taxes. Had no other agent for sale of land and paid no other agent commissions. Have no interest in Terrace City Realty Co. It is the real party in interest but not a party to the suit. Bought in after the suit was brought (Dep. 11 to 17).

Q. When did you first hear, as far as you now remember, that Mr. Holden had set up the claim that this transaction was nothing but a mortgage and not a transfer of the title?

A. I never heard of it till I heard of his filing a paper out in Topeka.

Q. When did you hear about that?

A. Well, I can not be specific about that; I presume soon after the filing, I don't know.

Q. Well, it was filed in 1904?

A. Well, I never heard of it until after the suit commenced.

Q. The first time you heard that such a paper had been filed?

A. The filing might have been filed in 1904 but I didn't know anything about it.

Q. And all this time from 1904 until the receivership of the National Bank of Commerce you had frequent meetings and conversations with Mr. Holden?

A. Yes.

Q. And concerning this very property?

A. Yes.

Q. And during all those conversations was anything said or intimated by Mr. Holden that he considered that he was still the owner of the land?

A. There was not.

277 Q. Now I will ask you to state, doctor, what the facts are in regard to the National Bank of Commerce having a large number of tracts of land which it had acquired and the title to which it was holding either in the name of Interstate Trading Company or in some other manner at this time at the same time that it acquired the title to this land?

Mr. GARNETT: I object to that question as assuming a fact which is in issue in this case, and as being immaterial and irrelevant to the issues of this case.

A. Will you allow me to make a little explanation?

Q. Go ahead.

A. As a sort of a preface of what I should have to say. Because of the volume of our business we necessarily acquired a great deal of property, more than we wanted the public to know by our statements. Therefore we organized the Interstate Trading Company as a holding company for properties. The Interstate Trading Company did not hold all of our properties. As to what they did or did not hold was a matter of judgment on my part at the time the transaction was had, but they held a great many titles for us. In such cases we would have the property deeded to the Interstate Trading Company, and the Interstate Trading Company would give us a note for the money. Instead of carrying it in our real estate account, we carried it in our bills receivable account. We tried to keep each transaction to itself. The Interstate Trading Company note was supposed to represent the cost to us of the property. A part of the property would be sold, the money collected, and reduce the
278 debt on note of Interstate Trading Company; or taxes might be paid on the property. The cost of the property to us was subject to change, either by sales or payments.

Witness states "if anything of consequence was to the credit of that collateral account, it was credited on the note of the Interstate Trading Co." (Dep. 17 to 19).

Lease to Kasper Heer to Jackson County lands dated Feby. 25, 1907, from the Interstate Trading Co. (Dep. 24).

(Dep. 25.) Tax receipts offered in evidence.

Bank did not carry Holden note on its books as bills receivable after delivery of deeds in fall of 1904.

Cross-examination by Mr. GARNETT:

Witness makes statements as to methods of the bank in the keeping of books and of collateral accounts (Dep. 27 to 41).

Has been acquainted with Mr. Holden for 35 years. Been friendly with him but never did much business with him until this transaction in 1901. He might have been doing some business in the bank before that time, but not in large quantities until a year or two before this loan was made (Dep. 42).

Mr. Holden was assisting him in the preparation of a proposed currency law. "I think I gave the skeleton to Mr. Holden and got him to finish it up for me."

Mr. DEAN: I object to that as not proper cross examination. I don't see what that has got to do with this case.

279 Mr. GARNETT: I just want to show the relation of the parties.

Witness also says Mr. Holden helped him in a law suit concerning Excelsior Springs property in which he was interested. Says he was "a very important witness," but denies that he called upon him to look after the matter or to hunt up testimony.

Witness is then presented with following letter, signature to which he states was his own, and which was read in evidence:

"Sometime when you are in the Commerce, I would be glad to talk to you about some property in Excelsior Springs, if you kindly drop back into my office. I have a game leg or I would come to your office, and when I go out at all I have to take a hack. Thanking you for calling. I am respectfully."

Says he don't know what it referred to (Dep. 44-45).

Then follows sundry letters which were shown witness and identified by him and commented upon and marked by the notary.

Mr. GARNETT: Says "they are only introduced for the purpose of showing the close intimate relations between the parties."

Witness is then asked if he wrote to Mr. Holden about securing the testimony of one Main and if Holden secured it for him. Says he "don't think anybody did specially." He is then presented with a letter to Mr. Holden and asked if he dictated it and says "I

280 am inclined to think I did." The notary marked it for identification, Exhibit A 14. It was read in evidence and is as follows:

"APRIL 4, 1906.

"H. M. Holden, City.

DEAR SIR: This is in answer to your very kind letter of April 3. I expect we have lost any possibility of finding Mr. Woosley. At the same time I will keep a look out and you keep the same thing, maybe we can run across somebody within the next month or six weeks that can give us some clue. I want to thank you for the very nice letter you wrote Mr. Edwin Main. You said exactly the right thing. The right thing and hewed to the mark. We will now wait for his answer. I appreciate very much your kindness in the matter and your services have been and will be very valuable to us.

Very truly,

W. S. WOODS."

Q. Do you remember writing that letter?
Judge ROBINSON: Please do not answer that question.
Q. I will ask you if you remember writing that letter?
Judge ROBINSON: Don't answer it, doctor.
A. Decline to answer.
Q. On the advice of counsel?
A. Decline to answer (Dep. 48-49).

Q. I will ask you if you remember writing a letter on or about April 7, 1906: "H. M. Holden, Esq., City. My dear Sir and friend: I am very glad indeed for the interest you have manifested in the Park case in Excelsior Springs. Your services are very valu-
281 able to us, and we appreciate the same very much. I am glad to know that Ed. Main will make a good witness. The next thing to do is to find out whether or not it would suit him to come to Kansas City, at our expense, and give his deposition, or had we better go over to Rockford? Shall I write him or had you better do so? Awaiting your answer, I am, yours truly, W. S. Wood"?

A. I decline to answer.
Q. You won't say whether you wrote that letter or not?
A. I decline to answer.
Q. I ask if that is your signature?
A. Decline to answer.

Then follow several other letters regarding the Excelsior Springs matter, which were read in evidence and marked for identification by the notary, questions regarding which the witness declined to answer (Dep. 50 to 53).

Witness is asked if as early as December, 1902, his terms of intimacy were such with Mr. Holden that he called upon him at that time to prepare a bill regarding currency laws to be submitted to Congress and says he advised with Mr. Holden about it and "we got up a bill."

A letter marked Exhibit A 21, by the notary, was read in evidence, dated Dec. 11, 1902: "H. M. Holden, Esq., City, Dear Sir, I have read with much interest the bill which you prepared. In the main it is all right, certainly it would be satisfactory to me. Some things I think they will stickle about. * * * I have presumed to send this bill to Senator Burton and asked him to do his best in
282 order to give us emergency currency. Yours truly."

Q. Dr. Woods, no action was taken on the bill that was presented at that time?
Judge ROBINSON: Don't answer.
Q. I say no action was taken on that bill at that time in 1902-3 and it went over until 1906, didn't it, and at that time Mr. Holden took the matter up with you again and prepared another bill, and you prepared an address, or Mr. Holden prepared it and you had it printed and claimed the credit of it?
A. Decline to answer (Dep. 53-55).
Q. That was purely a matter of friendship, wasn't it?
A. Yes, absolutely, yes.
Q. He gave his time to it?

A. At least I suppose it was, I never paid him any money, never asked me.

* * * * * * *

Q. Well, but he contributed valuable services to you?

A. You know in a city like this, there are two or three kinds of friends * * * there was never any enmity between me and Mr. Holden and never any special friendship.

Q. In other words, your feeling toward Mr. Holden was not such that you would not take all his property, if you got a chance, is that it?

A. I don't say that; I didn't say that, oh, no.

Q. Your friendship would not stand in the way when money was concerned?

A. I would not take his property unless I was entitled to it
283 and I don't think you ought to insinuate it, either. I think that is out of place.

Q. Well, that is in this case what we are trying in this case, doctor.

A. I ain't in this case, sir, at all, no interest in there.

Q. You have no interest in this case?

A. I am not a stockholder in the Terrace City Realty Company.

Q. Do you mean to tell the court now in this deposition you have no interest in this case?

A. I am a stockholder of the Commerce Trust Company and the Commerce Trust Company has got some stock in the Terrace City Realty Company, but I have no stock.

Q. How much stock has it?

A. They probably own a little over one hundred.

Q. A little over one hundred thousand of that stock?

A. Yes, sir.

Q. Then you are interested?

A. Just in that way. I am a stockholder in the Commerce Trust Company (Dep. 56-57).

—. Dr. Woods, I want to ask you now some questions about the original transaction, the making of this note of $80,000, which has been offered in evidence and is "Exhibit 1," I think. You stated, doctor, I understood you to say that you charged Mr. Holden interest on that prior to the date of the note. Do you remember how many days it was?

A. I couldn't tell you. There is the difference between the time agreed upon that interest should commence and July 1.

284 Q. At what rate did you calculate that?

A. I expect eight per cent interest.

Q. On what amount did you collect interest?

A. I expect I calculated on the $80,000.

Q. On the $80,000?

A. I expect so.

Q. The records of the bank would show that?

A. Would show.

Q. Yes. Now, you say that Mr. Holden had agreed to pay you that additional interest at that time?

A. Mr. Holden had agreed, if I would make this loan, it should

take effect as of a certain date, whether it was completed on that date or not; any delay in the matter, why it was at his expense.

Q. Now, did you have that talk with him before the date of the note?

A. Oh, yes, before I promised him the money.

Q. How long before the date of the note?

A. Before the date of this note?

Q. Yes, sir.

A. Previous to the day that was fixed, whenever that was.

Q. Do you recall where that conversation occurred between you and Mr. Holden?

A. In the National Bank of Commerce.

Q. Can you tell about the substance of what was said between you in regard to that interest?

A. I said to Mr. Holden in substance that when I promise a man money, get it for him, I should charge him for it at the date that I made the promise, whether he used it from that date or not.

285 Q. That is regardless of the date of the note?

A. Yes, it was his money the day I promised it to him, if he did not take it, and delayed, why he paid the interest just the same.

Q. So that is the way you got at the $460 some odd dollars?

A. I think that is what it amounted to.

Q. You calculated that from the date that you promised him?

A. Promised him the money.

Q. The first of July?

A. And date of the note.

Q. And that was eight per cent on $80,000?

A. Well, I expect so, I can't recollect.

Q. You did not turn over to him the $80,000?

A. Oh, no, we discounted the note. It says on the face of it here a year, one year, let see, and interest from—we took out a year's interest, I expect.

Q. You took out a year's interest on the $80,000?

A. Yes.

Q. That would be eight times—eight per cent of $80,000?

A. Charged him eight per cent discount on the $80,000.

Q. You took that out and gave him credit?

A. Credit for the difference.

Q. And in addition to that, you took out the $400?

A. Took out the interest covering the time from the engagement to the date of this note (Dep. 60 to 62).

Q. You had no written contract with him from the date of the engagement up to this time the note was signed?

A. I don't think so.

In addition to the collateral mentioned in the note, the 110
286 acres in Jackson County, Mo., held by Mr. Winants, was "practically hypothecated also" (Dep. 63).

Q. Well, if this note was intended to be secured by that 110 acres why didn't you mention it in the note?

A. Because it was not necessary; Mr. Winants was holding the deed for us, that is why it was made to Winants.

Q. But you had no contract in regard to that at all, did you?

A. No, I don't think we had; I don't think so.

Q. Mr. Holden just rested that upon the honor of the bank and Mr. Winants to hold that title to secure his property, didn't he?

A. To secure his debt, yes.

Q. Well, the former debt, it was pledged before that?

A. Well, it was all one debt.

Q. Well, it was pledged before, wasn't it?

A. Well, it was pledged whenever it was bought, whenever that deed was put up.

Q. Well, that is some time before?

A. I couldn't tell you about that at all; the books will show; I would not try to recollect it.

Q. The bank never gave him the credit—didn't you say that that property was held simply as security of the debt, the 110 acres?

A. No; it was just understood that we would take that property instead of taking the mortgage for it, we took title, and Mr. Winants would carry it.

Q. Yes, and carried for the purpose of securing Mr. Holden's debt to the bank?

A. Yes, sir; to secure this debt.

287 Q. Just a matter of honor then between Mr. Winants and Mr. Holden and the bank?

A. Yes, I think it was understood that way.

Q. You don't remember that he carried — that way about a year and a half?

A. I could not pretend to recollect that without looking at the records, but I should not think so. It was a good long while from the time we began to talk about this thing before it was finally consummated, five or six months, I would say.

Q. That is the explanation you have to give us as to why it is not mentioned in there as collateral of this note, is it?

A. I didn't think it was necessary. We had title to it; Mr. Winants was carrying it.

Q. You simply have title to secure the indebtedness that existed at the time?

A. Yes, sir; certainly that is right.

Don't know whether Mr. Holden paid interest on note and on Mutual Benefit note up to time of flood or not. Wrote him letters about the indebtedness.

Q. I will ask you if it is not a fact, Dr. Woods, that Mr. Patton handled these negotiations with Mr. Holden?

A. Mr. Patton?

Q. Yes, sir.

A. No.

Q. He was the claim agent at that time, was he, of the bank?

A. No, he never was a claim agent; we did not call it claim agent.

Q. What did you call him?

A. Had charge of certain assets we put in his hands to handle.

Q. What was Ruby?

A. The same thing.

288 Q. He was not a claim agent either, of the bank?

A. No, occupied the same position, both of them.

Q. Didn't you tell Mr. Patton to go to Mr. Holden and see about this matter?

A. No.

Q. Never did?

A. No.

Q. Never told him any time?

A. No, why should I, when I'd go myself?

Don't remember anything about the unsigned agreement of May 5, 1904. Thinks he never saw it. Don't recollect Judge Robinson telling him anything about it. Had talked with Mr. Holden in May about the transaction in question. Had lots of conversations with him (Dep. 66 to 69).

Q. Now, can you recall a single conversation that you had with him in May about this transaction?

A. I would not undertake to do it.

Q. How?

A. I would not undertake to say so; only in a general way I know I kept posted on what was going on.

Q. Yes, Judge Robinson kept you posted, didn't he?

A. Pretty well.

Q. But I am talking about so far as you yourself are concerned, can you remember of a single conversation that you had with Mr. Holden?

A. I could not repeat specifically any conversation I had with Mr. Holden regarding that contract.

Q. This transaction?

A. No.

Q. Nor any part of the transaction?

A. But I had frequent conversations with Mr. Holden.

289 Q. You say you can't remember anything?

A. Oh, I could not give the dates and papers.

Q. I am not talking about papers; I am asking about the substance.

A. I can not give you dates of conversations, but I had frequent conversations with Mr. Holden.

Q. You can not remember the substance of any conversation with him in May about the time of this transaction?

A. Well, I know that the debt was in default, the insurance debt.

Q. Yes.

A. I was wanting our money.

Q. You got that information somewhere else, didn't you doctor?

A. Yes, yes, yes.

Q. I understand you can not recall any conversation or the substance of any conversation you had with him in the month of May?

A. I could not be specific.

Q. Isn't it a fact, doctor, that you never talked with him about this at all; you left it to your attorneys?

A. To Mr. Holden?
Q. This transaction of May 5th?
A. It is not a fact. I don't recollect anything about that transaction, talking to him.
Q. Then if this contract of May 5th was submitted to Judge Robinson for his inspection before he drew the other, it must have been drawn by somebody else than yourself who had a conversation with Mr. Holden about this transaction?
A. That is your argument in the matter.
Q. Yes.
A. That is your argument.
290 Q. It did not come from you in any way?
A. I had nothing to do with drawing that contract.
Q. You never had any agreement with Mr. Holden as the basis of this contract, did you?
A. Oh, yes—not of that contract.
Q. I am talking about the contract on May 5th?
A. No, no.
Q. You were not present when the contracts of May 14th were signed—May 12th, were you?
A. Well, I was in very close touch with him, Mr. Garnett.
Q. I am not talking about——
A. I couldn't tell whether I was absolutely present and saw him put the chicken tracks or not; I don't know whether I was there or not.
Q. But you were not present when Judge Robinson and Mr. Patton and Mr. Holden talked about this matter, were you?
A. Well, I was present when several conversations were had in the matter.
Q. I mean after drawing the contract on May 12th?
A. I was kept fully advised and talked to Mr. Robinson.
Q. I ask if you were present when they were talking about it?
A. Of course, I was present when they were talking.
Q. When who was?
A. When Judge Robinson was talking.
Q. I am talking about when Mr. Holden and Mr. Patton were discussing this matter?
A. I don't know whether he was present when Mr. Holden was present or not; I don't know that he was there; I couldn't say.
291 Q. The fact is, Dr. Woods, you turned this whole matter over to Judge Robinson and asked him to look after it, didn't you?
A. Under my instructions.
Q. Under your instructions?
A. Yes.
Q. Judge Robinson went according to your instructions, then?
A. Yes (Dep. 70 to 72).

Mr. GARNETT: We have several times called for and made a demand on you for the following papers and now ask counsel on the other side if they have them and can produce them.

Then specifies note of Interstate Company to bank dated May, 1904, $83,675.32, payable Nov. 5, also one dated Nov. 12, 1904, one year after the date, $87,096.70, also note Holden Land and Live Stock Company to Howard M. Holden, dated July 1, 1901, $82,000, on one year which was endorsed over and delivered to bank as collateral security.

"Have you that note with you, Judge?

Judge ROBINSON: I have not given attention to the details and don't know anything about it."

Also, copies of reports of bank to Comptroller of the Currency on 16 different dates between Nov., 1904, and Dec., 1907, showing condition of the bank on the respective dates:

Also the vouchers and receipts for commissions said to have been paid out in this case.

Judge Robinson made no reply (Dep. 75-76).

Q. You were the president of the bank from 1901, I believe you stated, until its failure in 1907, were you not, doctor?

A. Yes, sir.

292 Q. This $82,000 note was delivered to your bank as collateral security for that $80,000 note, wasn't it?

A. I couldn't tell you.

Q. You don't know whether it was or not?

A. A man did as much business as I could not recollect about details.

Q. You say you don't remember anything about the details of that transaction at all?

A. The details of these matters we are talking about?

Q. Yes, well, that is part of the transaction you testified to about, wasn't it, this $82,000 note being delivered as collateral security?

A. That is for you to say; you heard the testimony. You can refer to my testimony if you want it and find out whether I said it or not. I can not recollect.

Q. You don't know whether it is or not, then?

A. I say to you, Mr. Garnett, that I did not do details of the bank. I directed other people to do it, and I would not recollect the minutiæ.

Q. I understand that, doctor, that the bank at that time was transacting a very large business and you could not look into all of those details, I understand that. Now, who looked after the details of this transaction with Mr. Holden?

Judge ROBINSON: I object to that question because it is so vague and indefinite. It does not indicate what information the attorney for the plaintiff desires. I think he ought to indicate.

(Question read by the Notary:) —in 1904.

293 A. Sometimes one person, sometimes another; it depends upon who I told to do it.

Q. Do you remember who you told to look after any part of the details of this?

A. Yes, indeed.

Q. Who, can you mention anybody?

A. Told Mr. Ruby to look after certain things; told Mr. Patton to look after certain things; told Mr. Beale to look after certain things; certain things went to discount it depended upon the department that ought to tend to it.

Q. Did you direct Judge Robinson to look after these details of this transaction?

A. I turned over to Judge Robinson this transaction to be wound up after I agreed with Mr. Holden what should be done.

Q. Do you mean to say you did not turn that over until you agreed with Mr. Holden what was to be done?

A. How is that?

Q. You mean to say that you did not turn that over to Judge Robinson until you agreed with Mr. Holden what was to be done?

A. I told Judge Robinson what we had agreed upon and left him to work out the details.

Q. You instructed him to prepare the contracts?

A. I instructed him to carry out the details.

Q. Personally, doctor, you took no part in the negotiations with Mr. Holden in this matter, did you?

A. Yes, I did.

Q. Do you remember any conversation you had with him in regard to it?

A. Yes.

Q. To the negotiations which led to these contracts?

294 A. Yes; I told you so the other day in my testimony.

Q. I understood you to say the other day that you could not remember any conversation that you had with him?

A. I think if you will read my deposition you will find that I told you we heard that the Insurance Company held a first mortgage on the land; was dissatisfied because the interest was not being paid and the taxes not being kept up; that Mr. Holden came to me—and further, I heard that they had put the matter in the hands of an attorney at Topeka, to be foreclosed.

Q. When did you hear that, doctor?

A. At the time whenever it was, when the transaction was being had.

Q. Just before this transaction?

A. Didn't say so. I say that it was at the time the transaction was being had, when they were acting; it came to me that they were wanting their interest which was not paid, and the taxes was not paid. Mr. Holden came to me and said they would sell it if we did not do something, and urged me to help. I said to Mr. Holden very candidly that I would not advance any more money unless my condition was made better. I felt that it was rather favorable to us that the other fellows were acting, because I could buy just as well under their sale as we could under our sale, and we were perfectly willing for them to take that course. I realized we had a mortgage and they had a mortgage; unless some trade was made we would simply have to conform to the law. We talked the matter

295 over. I told him what I wanted; advance the money if he could make title and put it in such a condition we would

not have any more trouble; he agreed to do so, and I turned it over to Judge Robinson to get up papers (Dep. 78-80).

Don't remember whether he sent Mr. Patton to see Mr. Holden or not in regard to the matter or whether he directed him to write any letters. Don't remember that Judge Robinson advised him not to sign May 5th contract (Dep. 82).

Q. Now then, doctor, irrespective of the papers drawn by Judge Robinson can you state in substance the agreement that was made between you and Mr. Holden before you went to Judge Robinson?

A. I think I can.

Q. Well, what was it?

A. I think I have done so.

Q. Well, what was that now?

A. I told Mr. Holden that we would not advance any more money or do anything, unless our condition was bettered; that we had a mortgage, took a long time to wind it up, and if we found that that was the only remedy we would commence it as quick as possible; I told him I would not do anything until our condition was bettered; that I would advance the money to these Insurance people, pay the taxes, if he gave us title, turned the land over to us and make no more trouble.

Q. Well, who did you agree with him that the title should be made to?

A. There was no agreement about who it should be made to, give title, it was supposed to be made to whoever the bank directed.

296 Q. Was anything said between you about to whom the title was to be made?

A. I don't remember; it was not of importance as far as he was concerned.

Q. Now I show you a note here—it is marked "Exhibit 7" Mr. Stenographer, I will get you to state if this is a note that was given by Mr. Holden representing the amount that you advanced to the Mutual Benefit Company, and for taxes?

A. I could not answer without looking at the books, but I am inclined to think it is.

Q. Your recollection is the amount is about that, wasn't it about that amount?

A. I think about that amount.

Q. Isn't that written part of it in Mr. Patton's handwriting?

A. I don't think so.

Q. You don't know in whose handwriting that written part is, do you, doctor?

A. I don't know; I don't think it is Mr. Patton's, though.

Q. Do you remember when the note was payable which he gave you for the amount advanced the Mutual Benefit Company?

A. I do not.

Q. How long a time did you tell Mr. Holden you would give him to pay that note for the money you advanced to the Mutual Benefit Company?

Judge ROBINSON: I object to that for the reason he has not said

he ever told him he would give him any time, assuming a fact which is not in evidence. I object for the further reason that the whole contract was reduced to writing and whatever conversations were had beforehand were merged into the written agreement, and that is the best evidence of what the contract was.

297 Q. Can you answer the question?

A. I can not recall now at this great distance.

Q. Well, that was part of the contract, wasn't it, you made with him when the title was taken over, as I understand you that you would not advance this money unless he would make title?

A. The agreement was——

Judge ROBINSON: Wait a minute, doctor, get through with your question.

Q. I ask you that, if that was not part of the agreement that you just testified to, that you would advance this money if he would make title?

A. Understand me——

Judge ROBINSON: I object to that, doctor. He asked you what you testified to just now and you need not answer it.

A. I have already answered the question, Judge.

Judge ROBINSON: Your testimony as to what you testified to just now is written down there?

A. Already answered two or three times. I just refer to my other answer.

(Question read by the notary:) I ask you if it was not part of the agreement. Now I did not ask you what you testified to, that you would advance this money if he would make title?

Judge ROBINSON: I object to that.

A. I told Mr. Holden that we were not going to do anything unless our condition was made better. We had a mortgage under which we had certain rights, and unless I took title, give us no more trouble, we would not help him out; if he did we would.

298 Q. That you would help him out?

A. Yes, sir.

Q. Now how long did you agree to give him to pay back that money; did you say to him in that conversation—did you say anything about the length of time which he could have it?

A. I could not recollect.

Q. Dr. Woods, I will ask you if you completed your negotiations with Mr. Holden in regard to this matter before you took it to Judge Robinson to have these contracts drawn?

A. I agreed with Mr. Holden to do certain things, and he agreed to do certain things, and went to Judge Robinson and told him what it was, and I told Judge Robinson to fix up the details, finish it up.

Q. I will ask you, Dr. Woods, if you did not instruct Judge Robinson to use your language once before in another matter "to fix up the fences good and tight that Mr. Holden could not get out"?

A. I do not recollect.
Q. How?
A. I do not recollect.
Q. I will ask you if you did not tell me, doctor, up at the bank when I first met you, that Holden had no case here, that you and Judge Robinson knew what Mr. Holden would claim, he would give you trouble, and you had fixed the fences up good and tight?
A. I don't recollect.
Q. Don't you remember that conversation?
A. I recollect the conversation with you but do not recollect having said that. (Dep. 82 to 85.)

299 Witness states that he is a director of the Commerce Trust Company which owns over $100,000 of the stock of the Terrace City Company. (Dep. 88.)

"Don't recollect at all" when possession was to be turned over or as to who would get the crops of 1904.

Q. Did you tell Mr. Holden that you would assume the payment of that Mutual Benefit Mortgage?
A. I agreed to pay the Mortgage?
Q. Yes?
A. I don't think so, you mean the whole Mortgage?
Q. Yes, sir.
A. I don't think so.
Q. The understanding was that title was to be turned over subject to that Mortgage after the deed was made?
A. Yes, sir.
Q. Before you took the title subject to the mortgage, why, you required him to execute a note for the amount of delinquent taxes and interest?
A. I couldn't say but I think so.

Don't remember about the lease that the Inter-State Co. had gotten up and signed but which Mr. Holden refused to sign. Was never on the land but had seen it from the railroad. (Dep. 90 to 95.)

Q. Can you remember, doctor, at this time the substance of the conversation between you and Mr. Holden in regard to leasing the property for 1905?
A. Yes, I told you what it was two or three times.
Q. I don't think you did in substance any conversation; you just said you agreed to so and so. I want to know what

300 you can remember?

A. Mr. Holden was in the bank very often, and the question came up about the rent of the farm. We were not getting any interest on our money, and I wanted something out of it; whether he proposed to rent it from us, or I proposed to rent it to him, I don't recollect, but there was a proposition made one way or the other; we canvassed the matter and I rented it to him for the year 1905 at $10,000. I told Judge Robinson about it, and I think I had the Judge get up the leases.

Q. The question is whether you remember the substance of your conversation with him at all?
A. I have given you the substance of it.

Q. That is as much as you remember.
A. That is the substance of it, in answer to your question.
Q. I say is that the substance of as much as you remember now?
A. Yes.
Q. Well, I understand that to be what you said to him. Now what did he say to you about taking it for 1905?
A. I said to you that we talked the matter over; I told him we were not getting any interest, wished to have something out of it; he either proposed to lease it or I proposed to lease it to him; it resulted in us agreeing to lease it for $10,000 for the year 1905. I told Judge Robinson about it and had the Judge get up the papers.
Q. At what time was this money to be paid according to your understanding with Mr. Holden?
A. I would refer you to the lease.
301 Q. I mean outside of the lease do you remember?
A. I don't remember. I knew at the time. I told Judge Robinson about it and got up the lease, and it harmonized with the agreement, whatever that was.
Q. Did you call on him for that $10,000 any time during that year?
A. I think I did repeatedly.
Q. Do you know how much money he paid that year?
A. I do not. I would refer you to the records, but if I was going to guess I would say between eight and nine thousand dollars.
Q. Maybe I misunderstood you, but I understood you in your direct examination to say that he claimed that he would turn over all of the proceeds of the crops for that year to you?
A. How is that?
Q. Mr. Holden claimed that that was all that he got out of the farm for that year?
A. I don't think that came out in the testimony.
Q. Something said about it.
A. I don't think so.
Q. How did you arrange the payment of the balance of the rent for 1905?
A. No arrangement about it, he could not do it and I did not get the money.
Q. What was said about it?
A. I asked him for it several times; he gave me promises; it dragged along in that way.
Q. Didn't he tell you that you had gotten all out of the property that he had for that year?
A. I don't recollect that he did.
Q. Didn't you testify that in your examination-in-chief?
A. I don't know; I don't think so.
302 Q. I can look that up after a while. Now then you said something in your examination-in-chief about making a different arrangement for 1906 and 1907?
A. No, 1906.
Q. For the year 1906?
A. For the year 1906.

Q. What arrangement did you make for that year?

A. We made a verbal agreement for him to take charge of the farm, take a lease on it for a part of the crop.

Q. That lease was not reduced to writing at all?

A. No.

Q. When you made that verbal lease for another year was anything said about paying up this back money for the preceding year?

A. I expect there was.

Q. Well, I ask you if you remember whether there was or not?

A. Well, I could not recollect specifically. I expect I made myself troublesome to Mr. Holden about the rest of that lease money; generally was after people that didn't pay.

Q. Now I would like for you, doctor, as near as you can give me the substance of what was said between you and Mr. Holden in regard to this verbal lease for 1906?

A. As near as I can recollect the question of leasing came up, and I talked to Mr. Holden about it, and we agreed upon a part of the crop, it was not written, to occupy the farm. That was in the fall of 1906, or winter of 1906, we had some question in our minds whether we was getting our part of the crop or not.

Mr. GARNETT: I am not talking about that.

Judge ROBINSON: Go ahead, answer the question in your own way.

303 Q. I object to his going any further. I am asking the substance of the conversation at the time of making the lease. I will get after a while about what occurred after that.

A. I have given it to you.

Q. That is all you remember now?

A. That is the substance of it; you asked me for the substance and I gave you the substance.

Q. That is all. Do you remember anything else that was said between you, the substance of anything else said between you about that lease in 1906?

A. 1906?

Q. Yes.

A. No.

Q. What part of the crop was he to give you?

A. Well, I could not recollect that now, Mr. Garnett.

Q. Was it half?

A. I don't know, but I posted myself doubtless as to what the custom was about renting lands.

Q. I am not asking that.

A. I have answered your question.

Q. Do you remember doctor, what proportion of the crop he was to give you?

Judge ROBINSON: I object to that, because he just now said that he did not remember. It is unnecessary to repeat it.

A. No, sir.

Q. Why, I understand the rule——

A. I said then, I say to you now, that I do not recollect what the percentage was, but I posted myself about what was right and proper, and agreed upon it. I don't know now what will be right.

304 Q. Now you say that he was to give you a portion of that crop?

A. Yes.

Q. And yet you don't remember what portion that was?

A. Not at this distance I could not.

Q. Do you know what crops were raised on that place for 1906?

A. Yes, largely corn.

Q. Do you know how much corn was raised that year?

A. No, but a good big lot of it.

Q. How much did you get for your share for 1906 of that?

A. I refer to the records, I couldn't say. I didn't think I was getting what I ought to and I sent a man up there to look after it.

Q. You said you didn't think you was getting what you ought to?

A. Yes.

Q. How much did you think you ought to have gotten out of the crop?

A. I ought to have got whatever the practice called for, the proportion of that I can not now remember.

Q. You say you don't know?

A. I don't know now but I did know then, a difference in recollecting a thing when it is being transacted and four or five years afterwards.

Q. You said you remembered so well, doctor, that you didn't get your share coming to you?

A. Because a few things impressed it on my mind that I cannot forget.

Q. What method did you take to ascertain as to whether you got the portion of the crop for 1906 that was coming to you under that agreement?

305 A. Just like any other business man would, I sent a man up there to see what was going on and how much was there. I found a lot of corn up there, took possession of it; I say I took possession—I was not there—I had my man take possession.

Q. You don't know what he did, do you, personally?

A. Well, no, I don't know it only what I was told.

Q. I am asking for your information now?

A. I am answering you.

Q. Doctor, don't you know as a matter of fact that Mr. Holden turned over to you all of the proceeds of the crop for 1906?

A. To the contrary I don't think he did. If I had not had some reason to suppose he was not doing so I would not have interfered.

Q. Doctor, I will ask you if it is not a fact that Mr. Holden had that corn, that you sent up to look after, ready to ship, and if you did not request him and advise him to hold that for a better market?

A. I did not for it was our corn; I advised with him, probably, as to whether it was a good time to ship or not.

Q. Now doctor, you did not look after the details of that transaction, did you?

A. No, sir.

Q. That was left to Mr. Wheeler?

A. Yes, sir, I think it was Wheeler, the man in charge.

Q. A witness in this case?

A. I think so.

Q. Did you instruct Mr. Wheeler when he went up there, to see how much crop was on that place that was raised?

A. I expect certainly went up there to keep his eyes and
306 ears open and learn everything he could about the crop proposition.

Q. Where was a division of crop to be made that was raised on the place?

A. I don't recollect; according to custom I suppose.

Q. Did you instruct Mr. Wheeler as to the method he should pursue in ascertaining what part of the crop belonged to you and what part belonged to Mr. Holden?

A. No.

Q. Doctor, in that lease of 1905 a statement is made that the bank had then acquired title to the property from the Interstate Trading Company. When did the bank get a deed from the Interstate Trading Company if at all?

A. I refer you to the written proposition. You say it states it. You ask me to draw a conclusion.

Q. No, I see it is stated in your lease, that the bank had then acquired title. It is a fact the bank never did get a deed from the Interstate Trading Company, isn't it?

A. I don't know.

Q. How?

A. I don't know. (Dep. 96 to 101.)

Afternoon Session.

Dr. William S. Woods.

By Mr. GARNETT:

Q. Aren't you mistaken about your having an arrangement with Mr. Holden for the crops of 1906?

A. I don't think so.

Q. Might it not be that that matter was left open to be adjusted afterwards?

A. I don't think so.

307 Q. There had been a good deal of property sold in the spring of 1906, hadn't there?

A. I couldn't tell you, Mr. Garnett, without looking at the records; they were selling whenever they could.

Q. Have you a letter from Mr. Holden, dated February 11, 1907?

A. Have I?

Q. In regard to this matter, yes, sir?

A. If I had, Mr. Garnett, I could not find it.

Judge ROBINSON: What is the date?
Mr. GARNETT: February 11, 1907.

Q. To refresh your memory, doctor, I will ask you if on or after that date you received a letter from Mr. Holden of that date, Kansas City, Missouri, February 11, 1907, of import as follows:

"Dr. W. S. Woods, President National Bank of Commerce.

DEAR SIR: In the matter of payment to the bank on account of crops raised in 1906 on the farm in Shawnee County, I would like to state what may not be known to you, that last spring and early summer the subject was several times brought up between Mr. Ruby and myself and sales were being frequently made generally of the most productive lands, the basis was not then determined for any accurate time in advance of what should be paid for the year, and so it was mutually considered that that point should be passed over until later in the season. Mr. Ruby will confirm this statement. He went away in July and has not been here since to renew consideration of the subject. I have spoken to you about it several times and have paid over what came into my hands, but probably what has been said has not in the great press of matters upon you, been remembered.

308 Understanding from Mr. Robinson that it was your wish that what was to come in, should come in as soon as possible, I was moving to have the corn shipped when you advised me that you thought it better be held for the present.

I would now be glad to have an understanding with you such as Mr. Ruby and I expected we would have as to the amount that should be fairly paid on account of 1906 crops, and my aim would then be to have it paid at some early date in settlement of my liability on that account.

In handling a large place with such varied conditions as to river front, water courses, diversive character of land, etc., there are always numerous essential things to be done involving considerable expenditures, and this I have always aimed to have done. An illustration is that crib which we built of new material, and only leaving roof off, because I thought you wished the corn shipped out early. Other such things about the place have been and are being done, including repairs, protection against water by ditches or levees, breaking up new ground to enhance the revenues and values, and make more salable, etc. Mr. Wheeler said the place looked well, but that was because of good care taken which it is, of course, necessary to maintain.

I would be pleased to have the matter determined and agreed upon with just regard to your interests either by instruction direct or with Mr. Wheeler or otherwise as you may prefer.

Yours truly,

H. M. HOLDEN."

"P. S.—When the sales now under contract, are closed, which will be March 1st, over $102,000 will have been realized to the bank

within the last twelve or thirteen months, not including anything on account of 1906 crops, and this without impairment of margins.

I think this is quite a fair record considering that the move-
309 ment for lands has been going to the regions further west and south, and also the depressing effect of the big flood over Kaw Valley lands which has not yet fully disappeared."

Do you remember getting a letter of that import?

A. I do not. I remember this, Mr. Garnett, that the rent for 1906 was not in dollars and cents, but a certain part of the crop, consequently, the sale of lands would not cut so much figure.

Q. I am asking you now if you remember reading this letter?

A. I do not.

Letter in reply identified and read in evidence as follows:

"KANSAS CITY, Mo., *February* 11, 1907.

"Mr. Howard M. Holden, City.

"DEAR SIR: I have read your letter of the 11th. I wish I had more time but I am very much overworked as you know quite well. I got Mr. Wheeler to take Mr. Ruby's place, and about the only thing I can do is to give Mr. Wheeler general instructions and let him advise with Mr. Ruby. Of course any understanding you had with Mr. Ruby will be carried out. In my opinion the corn does not want to be sold now. It is worth too much money. It ought to be properly covered with a shed and protected. I will have Mr. Wheeler write Mr. Ruby and try and straighten out anything that is not understood.

Very truly yours,

W. S. WOODS."

Q. Now does not that, Doctor, refresh your memory as to
310 the fact that Mr. Ruby did have authority to make arrangements about those crops up there?

A. No, they never had any; they had such authority as I gave them.

Q. I will ask you, Doctor, if in reply to that letter you did not get one, dated February 12, 1907, as follows:

"KANSAS CITY, Mo., *February* 12, 1907.

"Dr. W. S. Woods, President National Bank of Commerce, City.

"DEAR SIR: Your- of the 11th received. I will see Mr. Wheeler about the matter. I supposed you would probably refer it to him. I felt myself under a money obligation with respect to the crops and felt that I should be moving towards its discharge.

I realize the pressure that is upon you and have all the time done my best toward the liquidation of what I was connected with in the bank, with careful regard for its interest, without bothering you, since Mr. Ruby left, except to so far present matters as to have your advice and concurrence, and I feel now, as I have all along felt, that

in any matter of your own or the bank's wherein I can be of any possible service I shall be glad to perform it.

Yours truly,

H. M. HOLDEN."

A. I could not remember.
Q. Don't remember getting that letter at all?
A. I do not.
Q. Do you remember of replying to that letter?
A. I don't remember. I can look and see what you got there, and there may be some circumstances——

311 Q. I ask the stenographer now to identify the letter (the letter referred to was marked by the notary for identification "Exhibit A-23"). I show you that purported reply, and ask you if you remember anything of writing it?

A. I don't remember it specifically, but under all the circumstances I am inclined to think I wrote it.

Mr. GARNETT: I now read the letter in evidence:

"EXHIBIT A-23."

"KANSAS CITY, Mo., *February* 13, 1907.

"Mr. H. M. Holden, 665 Gibraltar Building, Kansas City, Mo.

"DEAR SIR: This is in answer to yours of the 12th inst., and have noted contents. I fully appreciate your goodness and courtesies bestowed.

Very truly yours,

W. S. WOODS, *President*."

Q. Now you do not recall any part of that correspondence?
A. I do not recall it, but I think it was dictated under the circumstances. (Dep. 106 to 110.)
Q. Doctor, did you ever see this agreement of May 12, 1904?
A. I could not say specifically that I have.
Q. That is the one that is drawn between the Interstate Trading Company and Holden?
A. I understand you refer to this one that Judge Robinson prepared at my request?

312 Q. Yes, so you don't know whether the judge prepared this according to your own instructions or not then, do you?

A. No.
Q. As far as your recollection is concerned?
A. No, I think, I am inclined to think, although I couldn't say specifically, I am inclined to think I saw that one, and the other one too, 12th and 14th, both.
Q. You think you saw this?
A. I think so.
Q. I would like for you to refresh your memory on that, whether you did see this or not, and I hand you the agreement which is marked "Exhibit 8" and — be glad if you would read that over—I want to examine you about it—refresh your memory about it.

(Witness reads paper handed to him by plaintiff's counsel.) Now what do you want to know about it?

Q. Now, since reading this agreement I will ask you if you now recall any negotiations you had with Mr. Holden which resulted in your agreeing upon the contract that is set forth in that agreement?

A. I will state now, as I stated before, that Mr. Holden and I had an agreement when he wanted me to pay off that interest and taxes that I would not advance any more money unless my condition was bettered. As it was then I had a mortgage, it would take me a long time to foreclose it, I preferred to let the insurance company foreclose, and make no negotiations at all unless my condition was bettered. It was agreed that I would liquidate that debt or furnish money to pay off the interest due on the insurance company and taxes, providing he would make us title to the land; and I
313 think a part of that agreement also set forth the fact that he was to have the right to sell that land within a given time for a certain price as provided in that contract?

Q. You didn't remember anything about that this morning, did you, that part of it?

A. Which part?

Q. About his having the right to sell the land?

A. Well, I don't know whether I did or not. If I testified I did not, I didn't recollect it, but my memory is quite positive about that, Mr. Garnett.

Q. About what?

A. That he had a right to sell the land up to a given time.

Q. Why didn't you say that this morning when you testified about it?

A. Well, did you ask it? (Dep. 110-111.)

Q. Doctor, you said that you wanted to provide a way of getting your money, had been carrying this debt a long time, up to that time Mr. Holden had not paid anything?

A. I didn't say he had not paid anything.

Q. Not in that language but you said you were tired of carrying it?

A. Yes, I said that.

Q. And you told Mr. Holden you wanted to make some arrangement, didn't you, by which you could get your money out of this land?

A. I told him that I would not advance any more money or make any change in the conditions, unless my condition—our condition—was bettered, and bettered in the direction of putting us where we could get action.

314 Q. So you would not have to foreclose under the Kansas law?

A. Yes, that is right.

Q. In other words, you agreed with him that the title should be conveyed to the Interstate Trading Company, or to you or somebody else at that time, and give them the right to make conveyances of the land?

A. My understanding was just what that contract says is to make title, now I don't think it was discussed whether to make it to me

or the bank or the Trading Company—probably anybody I might designate.

Q. Didn't you agree with Mr. Holden that the Interstate Trading Co. would take title to this land and that if the property was sold any time before Nov. 9th, 1904 for enough money to pay these notes, then you would give him the rest of it?

A. My understanding with Mr. Holden was just this that he would have a right to sell this land till the 9th of November and pay us so much money.

Q. Well, what amount of money was to be paid?

A. Whatever that shows there, I don't recollect.

Q. Well, the amount, you know, Doctor, the amount was his note, don't you?

A. Why, it is figured on the note there, yes, made a basis of it.

Q. That if he would sell enough of that land to pay his note and the advancement to the Mutual Benefit Co.

A. You can put it that way if you want to (Dep. 115-116).

315 Q. You knew, Doctor, that in every sale that was closed you had to get a quit-claim deed from Holden Land & Live Stock Company?

A. We often take quit-claims as a precaution.

Q. Don't you know every abstract that you furnished to the purchasers showed the filing of this contract between Holden and the Interstate Trading Company?

A. No, I do not.

Q. Did you ever have the record examined in this case at all?

A. No.

Q. Did you ever have anybody to look over the records at all?

A. No.

Q. At no time?

A. No, I don't think so.

Q. When you took this title from Mr. Holden did you have anybody then to examine it?

A. Well, I couldn't say about that. I don't recollect.

Q. Don't you know you never did?

A. I guess it was examined when we took mortgage.

Q. Not what you expect now, what you did?

A. Listen a minute and I'll tell you. We had to examine it, I understood, we took a mortgage, but I don't think we examined it after that.

Q. Never examined it after that?

A. I don't think so.

Q. You did not cancel that mortgage when you got this contract and trade was made?

A. I don't know, the records will show.

316 States that when bank bought the Mutual Benefit note, it took it in Patton's name, that the bank furnished the money and Patton made note to the bank for the amount with the Mutual Benefit note and mortgage as collateral security, that Patton had no interest in the matter (Dep. 118-120).

Q. Well, there was none of this land sold prior to November, 1904, was there?

A. I couldn't tell you.

Q. Don't you know that there was?
A. No, I don't know.
Q. You did make arrangements with Mr. Holden afterwards to sell the land?
A. How is that?
Q. You did make arrangements with Mr. Holden to sell the land?
A. Oh, yes, yes.
Q. Now when was that arrangement made?
A. That was made after we came in possession of the title.
Q. That is the question we are litigating. Can't you give some date?
A. No, sir; after the deed—after Patton had delivered the deed to Mr. Holden put in escrow, then the title had passed and we had a right to then.
Q. There was nothing said in this contract here about an escrow deed?
A. Oh, well, no.
Q. How long after the date of this contract was it, you had the conversation with Mr. Holden about selling that land?
A. I think it was after the other deed was delivered.
Q. Well, of course he testifies he delivered it on May 12, 1904——
—. ——.
Q. With reference to that date, when was it you made the contract with him to sell the land?
A. Just the same as that, no reference to it at all.
Q. I say with reference to that date of this contract of
317 May 12, 1904?
A. I have told you all I can possibly tell you; I can not recollect the dates; I have got so many other things to recollect.
Q. Did you make that contract with him, Dr. Woods, in 1904?
A. I made that contract with him, whatever the papers show, and I don't think I made the contract with him until we had a right to it, not until after the deed was delivered.
Q. I am not talking about this contract. I am talking about the contract you say you made with him to sell the land?
A. Yes.
Q. There were no papers written about that, were there?
A. There is another contract following this other, will tell all about it.
Q. There is nothing in that said about selling the land?
A. I don't know; you have it in evidence, and it will show whether it did or not; I can not recollect everything.
Q. Can you remember whether there was any contract about his selling land other than this?
A. Whether there was any other than this?
Q. Yes?
A. Yes, yes.
Q. Where was that—the contract May 14th?
A. I think you will find it in there, I don't know.
Q. That is your understanding, May 14th?
A. Well, I don't know, I could not tell you; you bring your contract here and look it over and see whether it does.

Q. At what other time did you make——

A. I don't recollect.

318 Q. Wait till I ask the question, won't you?

A. Yes.

Q. At what other time did you make any arrangement with him to sell the land?

Judge ROBINSON: I object to that for the reason that that was all gone over this forenoon, about a verbal contract that was made afterwards to sell this land for a certain commission; that was all gone over this forenoon, and it seems to me——

Mr. GARNETT: We did not get into that question.

Judge ROBINSON: We did get into that question.

Mr. GARNETT: The record, I think, will show you are mistaken. (Question read by the notary.)

A. I made no arrangement with him to sell the land at all except as the contracts show.

Q. You mean by that, the written contract?

A. The written contracts.

Q. Never did make any arrangement to sell except the written contracts?

A. I made arrangements and the written contracts is the consummation of it.

Q. How is that?

A. I made arrangements as to certain things, turned it over to Judge Robinson, and the contract is the consummation of the arrangement—carrying it out.

Q. That is the only arrangement you made with Mr. Holden in this contract written contracts?

A. That is all I recollect now.

Q. Didn't you testify in your examination-in-chief that you made an arrangement with Mr. Holden whereby he would sell

319 the land at five per cent commission?

A. Five per cent commission, I think, for the first thousand and probably two and one-half after that.

Q. That is what your attorney added, wasn't it?

A. No, sir.

Q. The record will show. That was another arrangement for selling land, wasn't it?

A. I think that was the same arrangement.

Q. Specified in these written contracts?

A. I think so.

Q. But you have no independent recollection then of any arrangement for selling this land except——

A. I have no recollection.

Q. Except what is in those written contracts?

A. Correct (Dep. 121-123).

Q. Doctor, you were very particular in this case every time Mr. Holden would make a sale of a tract of land there, to see that he signed a receipt for the commission, weren't you?

A. I expect so.

Q. I expect you were?
A. Yes, I expect so; generally want a receipt from a man when we pay him money.
Q. Have you got any of those receipts with you?
A. I have not.
Q. Have you looked for them?
A. No, sir.
Q. Didn't you know that we would call for them here in this case?

Judge ROBINSON: I object to that because Dr. Woods is not a party to this suit nor in any way interested in it. You have
320 no right to ask him whether he knows that you would call on somebody else for receipts or not. I don't think that is a fair way.

Q. Have you any idea where those receipts could be?
A. I have not.
Q. Why were you so very particular about getting receipts every time from Mr. Holden signed by him alone?
A. Well, I let you answer that question.
Q. I am not on the stand. I say why were you so particular?
A. Why am I particular about what?
Q. As to have a receipt signed by Mr. Holden alone in every one of these?
A. I am particular in anything to let money go.
Q. Can you explain that?
A. I explain it by the fact that I wanted a receipt for the money.
Q. Is that the only explanation?
A. I wanted to show what it was for; that is all the explanation necessary.
Q. Wasn't it for the purpose of trying to fix up your fences a little?
A. No.
Q. Try to make it appear that Mr. Holden was selling that on commission?
A. Oh, no, no.
Q. You were very particular, weren't you, doctor?
A. No, no more in this case than I am in others.
Q. I will ask you if you remember writing this letter to the bank at Topeka, which has been introduced in evidence in this case as "Exhibit No. 102." I will ask you if you wrote this kind of a letter to the Bank of Topeka:

321 "KANSAS CITY, Mo., *March* 5, 1907.

Bank of Topeka, Topeka, Kan.

DEAR SIRS:

(For copy see page 221 of this abstract, identified by J. W. Thurston, cashier of the Bank of Topeka as bearing signature of Dr. Woods. The postscript of the letter reads as follows:)

"P. S.—We enclose a sample receipt to be used for the commis-

sions paid Mr. Holden. Please use this exact form of receipt in every case and see that they are all signed by Mr. Holden only."

Q. Do you remember writing them that letter?

A. I do not recollect specifically, but I expect I wrote it or had it done. This is a copy, is it?

Q. Yes, taken—it is on file in the court.

A. I don't recollect but I guess I wrote it or had it done.

Judge ROBINSON: Taken from what files?

Mr. GARNETT: It is copied from the files in this case; it was introduced there, and of course, the record——

Judge ROBINSON: It was introduced there?

Mr. GARNETT: This letter, and the stenographer made up this copy of it.

Mr. HOLDEN: The stenographer up there in this case copied it.

Judge ROBINSON: What I wanted to know is whether the letter which was introduced in evidence came from the Bank of Topeka or not.

Mr. GARNETT: The records here will show, but my impression Judge, is that one of their officers in the bank was on the stand testifying under a subpœna issued for him.

322 Mr. HOLDEN: I can make a statement so as to exonerate the bank up there.

Judge ROBINSON: I don't suppose the bank needs exoneration. What I was trying to find out is whether this letter was signed by Dr. Woods individually, or signed by somebody in his name.

Mr. GARNETT: My impression is up there, when it was presented, the signature was identified by the officer of the bank whoever presented it, and the proof was made of it when it was introduced. I will look that up for you, if you want to.

By Mr. GARNETT (resuming):

Q. Dr. Woods, do you know why this great solicitude on your part for having these receipts signed by Mr. Holden only, for commission?

A. Because he was the only proper party to sign them.

Q. Is that the only reason?

A. That is the reason.

Q. Didn't you know at that time, doctor, that Mr. Holden was claiming that this land was simply being held in trust to pay his debts?

A. I did not.

Q. And was not this for the purpose——

A. It was not.

Q. Of fastening up on him the fact that he was simply acting as agent?

A. I call that a very ordinary transaction. I wrote the same letter to anybody (Dep. 124-127).

Q. When you advanced that money to the Mutual Benefit Company and took Mr. Holden's note for the amount, what se-

323 curity did you take for this payment, if any?

A. I don't recollect, Mr. Garnett.

Q. Was there anything said between you and Mr. Holden as to what security he would give you for the payment of that note?
A. I couldn't say; I don't recollect.
Q. Doctor, in October, 1906, Mr. Rubey was the manager of the claim department of the bank, wasn't he?
A. I don't know just exactly when Mr. Rubey left, but the records up stairs will show.
Q. He succeeded Mr. Patton?
A. He succeeded Mr. Patton.
Q. He occupied the same position that Mr. Patton did, did he?
A. Yes, pretty much.
Q. And after Mr. Patton left, why he took up this Holden matter to look after, didn't he, just as Mr. Patton?
A. He took Mr. Patton's place in the bank.
Q. Do you know Mr. Rubey's handwriting, doctor?
A. Yes.
Q. See if that is?
A. I think it is, sir.

(The letter handed to witness was marked by the notary "Exhibit A-24.")

Q. I see, stamped on the corner of the letter, it says, "Address answer to J. W. Rubey, Mgr. Claim Dept."?
A. Let me see that. Well, what do you want to know about it?
Q. He was the manager of the claim department, wasn't he?
A. After he left here he was not.
324 Mr. GARNETT: I read the letter in evidence. It is on one of the letterheads of the bank, giving the officers of the bank, and in the corner is "Address answer to J. W. Rubey, Mgr. Claim Dept."

"KANSAS CITY, MO., *October 11th*, 1906.

Mr. Howard M. Holden, Gibraltar Bldg., City.

DEAR MR. HOLDEN: I reached home a few days ago, and would be glad to see you sometime the first of the coming week, to go over matters with you.

Yours respectfully,

J. W. RUBEY."

WITNESS: Is that dated in Kansas City?
Q. Yes, sir.
A. Then he must have been in Kansas City, and must have been in the employment of the bank at that time.
Q. What I was trying to fix, doctor, the facts that while here, he was the manager of the claim department?
A. Well, you call it "claim department," he calls it "claim department." It is called different names by different people.
Q. Mr. Patton had the chief oversight over this Holden matter, didn't he Doctor?
A. Dr. Woods had it.
Q. How?
A. Dr. Woods had it.

Q. Well, I mean looking after the details of it?

A. Yes, while Mr. Patton was in our employ he did under my instructions.

325 Q. Doctor, in your direct examination you made this statement: "As a sort of preface of what I should have to say, because of the volume of our business we necessarily acquired a great deal of property, more than we wanted the public to know by our statements; therefore we organized the Interstate Trading Company as a holding company for properties." I will ask you, doctor, to explain what you mean by having more property than you wanted the public to know by your statements?

A. Kansas City is a very sensitive town regarding banks. Any loss a bank makes, if known in the community, reflects on the management, and more than that—the more real estate they owned and advertised, it reflected somewhat on the bank."

Q. Your purpose then was to conceal the fact that you owned this real estate from the public?

A. Well, the fact, to put it plainly, I suppose it was to some extent, in part doubtless.

Q. And to conceal from the public the real condition of the bank?

A. To put it plainly that is what it was in part.

Q. And in your statements to the Comptroller you concealed from him the fact that the bank claimed to own this real estate, didn't you?

A. No, no; we never kept anything from the Comptroller.

Q. Do you mean to say then that you listed this property in your statements to the Comptroller as real estate?

A. I mean to say that the statements were made to the Comptroller would not list any real estate (Dep. 131).

326 Q. Doctor, you knew the situation up there in 1903 after that flood, didn't you?

A. In a general way I did, yes.

Q. You knew these lands had been badly washed?

A. I knew some of that land was pretty badly washed.

Q. And deposits of sand put over on the land?

A. I didn't know anything about the deposits, mister.

Q. And that they needed protection at that time, didn't they, you knew that, from the flood?

A. No, I didn't know what it needed; I knew that the flood had damaged a good deal of the land on the Kaw and probably this land.

Q. And you knew at that time after that flood of 1903 lands up there were unsalable, didn't you?

A. I knew they were not as salable as they had been.

Q. Yes, and I will ask you if it is not a fact that just as soon as you found that those lands were unsalable if you did not then plan to acquire title to them?

A. I did not and I say that your question is insinuating and ungentlemanly.

Q. You did not plan to acquire title?

A. I did not, and I say it is unnecessary and uncalled for.

Q. When did you first plan to acquire title to the property?
A. Never planned at all except as I told you.
Q. You never planned to acquire title to that property?
A. No, sir.
Q. You never planned?
A. Never wanted title.
Q. Yes, never wanted title?
A. No, sir; except had to take it.

327 Q. Yes, sir. I will ask you if in directing the preparation of this contract if you was not then planning to acquire the title of Mr. Holden's land up there?

A. I say no, and I say the question is impertinent and insinuating.

Q. Well, you claim now that you did acquire title, don't you, for the bank?

Judge ROBINSON: You need not answer that question any more, doctor.

Q. You saw that Mr. Holden was in embarrassed circumstances, didn't you, and that he could not sell any of that land that you had security on, and you commenced then to force him to turn that land over to you, didn't you?

A. Now you begin your insinuations again.
Q. Well, can you answer that yes or no?
A. No, I won't.

Q. You need not answer it then if you don't want to. You commenced right away to threaten to foreclose the collateral he had up with you, didn't you, doctor?

A. No, that is insinuating and unnecessary.
Q. You never commenced to threaten that?

A. No, I never threatened him with anything. I urged him to pay our money to us.

Q. Didn't you threaten that if he did not pay up at that time that you would foreclose these collaterals?

A. Oh, I might have said something of that sort, may have written him a letter to that effect; I know I was trying to get the money paid.

Q. Why do you say the question is insinuating?

328 A. Because you was insinuating that I was laying the foundation to take this land away from him.

Q. You were, weren't you, doctor?
A. Insinuating again—no.

Q. Weren't you preparing by this contract to get title to that land?

Judge ROBINSON: I object to that, because the contract speaks for itself, and you need not answer it, doctor. The contract is plain and unequivocable, and it speaks for itself. It was put in writing because the written instrument is the best evidence of what the contract is, because nobody would have to rely upon the verbal testimony of what might be produced years afterwards.

Q. In urging Mr. Holden to change the form of his indebtedness there was it your intention then to ultimately acquire title to that

property or simply to collect the money that Holden was owing you?

A. It was never our desire to acquire title. We never lend money to get title. We wanted the money back again.

Q. Your intention then was simply to get it in shape so you could get your money out of it?

A. I have answered your question.

Q. Was that your intention?

A. I have answered your question.

Q. Wait till I ask it. Was it your intention to simply get it in a shape so that you could get your money out of it?

A. I have answered your question.

Q. Is that the only reason you have to give?

A. The only reason, I have.

329 Q. And you will not answer it any further?

A. No.

Q. Well, by the arrangement with Mr. Holden you did get in shape so as to get your money out of it, didn't you, everything you had invested?

A. No.

Q. Everything that you loaned?

A. No.

Q. I will ask you, don't — know that at the present date through Mr. Holden's efforts in the care of that property he has sold property enough and turned enough money over to the bank to take up that $80,000 mortgage?

A. That was not all of the debt.

Q. How?

A. That was not all the debt; there was $65,000 debt besides.

Q. I am talking about this second mortgage?

A. I don't know how much has been sold and how much has been paid. I refer you to the records.

Q. And if you only wanted to get your money out of it, and have already gotten your money out of it?

A. Now you are putting a hypothetical case.

Q. Why are you contending for the land?

A. Decline to answer (Dep. 142-146).

Q. I will ask you what your intention was in regard to acquiring title to that land when you made this contract with Mr. Holden?

A. My intention was to get it in better condition than it was.

Q. Get what in better condition?

A. Get the transaction as it stood.

Q. What do you mean by the transaction?

A. Why, I have told you two or three times, had a mort-

330 gage that would take two or three years to close it out in, we wanted to be put in better shape. Mr. Holden wanted us to advance some money to keep other fellows from selling it out. We came together, we made an agreement, if he'd do certain things, I would do certain things. One of the conditions was I would get title to get out of trouble; the other was he'd got to sell the land till last fall.

Q. Then your object was to get title to the land?
A. Decline to answer.
Q. You decline to answer that?
A. Yes.
Q. Well, let it go at that. Doctor, I will ask you if it is not true that Mr. Holden ever since the making of this contract, in every conversation relating to the contract with you, did not claim that you simply held this land as security?
A. Mr. Holden has never to this moment in any conversation with me claimed this land.
Q. Didn't he in his letters to you claim it?
A. You have got a number of letters there that kind of insinuates that, but he never face to face to me had the presumption to claim it.
Q. Now when did you first find out that he claimed title to it?
A. That he claimed title, I told you two or three times, in a letter.
Q. When the suit was brought?
A. Whatever the testimony is, I answered that two or three, four times, half a dozen times I expect.
Q. Never knew it until this suit was brought?
A. I have answered it already.
331 Q. You stand on the answer that you have made?
A. Yes, sir. I stated that Mr. Holden never personally claimed to me he had any rights in this land. He wrote a couple of letters that were insinuating to that effect.
Q. Now Dr. Woods, referring to "Exhibit 81." I will ask you if you received this letter: "Kansas City, Mo. February 18th, 1907. Dr. W. S. Woods, President National Bank of Commerce, City."
A. What is the date of that?
Q. February 18, 1907. (Reading:)

"DEAR SIR: Knowing your wish that the bank realize as rapidly as possible, I have made every effort to make sales of the land without undue sacrifice, which you have advised against. It has been a little slow, owing mainly I think, — the furor for lands farther West and South, which the railroads and the land agents have so actively worked up, and which has largely carried the tide past the more eastern sections, and partly because of the cloud that remains to some extent upon lands near the river on account of the big flood.

When the sales now under contract to be closed by March 1st and on which cash payments are now in your hands, are closed, the amounts received within a little over a year aggregate over $102,000, exclusive of anything from the crops of 1906.

It might be that I could relieve you altogether of the matter within a very brief time. Will you kindly advise me the amount required for that purpose and to redeem the property. I will do my best to close up this old matter and then to make myself useful to you in any way I can in live matters.

Yours truly,

H. M. HOLDEN."

Q. Did you get that letter?
A. I don't recollect.
Q. Don't remember anything about that letter at all, do
332 you?
A. I don't recollect now specifically whether I did or not.
Q. Do you remember of answering that letter, and I read from copy of "Exhibit 82," "Kansas City, Mo., Feb. 20th, '07. Mr. Howard M. Holden."
A. What is the date of that?
Q. February 20, 1907. (Reading:)

"Mr. Howard M. Holden, 665 Gibraltar Bldg., City.

DEAR SIR: This is in answer to yours of the 18th. I beg to say I will have the matter looked up, and see just where I stand. Of course, I have had but little to do with the details of this proposition.

Yours very truly,

(Signed) W. S. W., *President.*"

Q. Did you write such a letter as that to Mr. Holden? This is just a copy of the exhibit on file?
A. I couldn't tell you.
Q. Taking your testimony before the referee in this case, of course you could see these original exhibits, otherwise we will have to use these copies. Now you do not recall that letter?
A. I don't remember the writing but I would not be surprised if I did read it.
Q. It is a fact that you had but little to do with the details of this proposition?
A. Only to direct the general outline.
Q. Well, you knew when you got that letter that he was selling lands in order to liquidate that indebtedness to the bank, didn't you?
A. I understood he was selling lands to get his commission.
333 Q. What did you understand by his statement—liquidate the indebtedness to the bank?
A. I understood—you might understand most anything about it.
Q. Yes.
A. I probably concluded that he was trying to make some statement there to get me to commit myself to something I answered him just like he answered me, just like he wrote me.
Q. Well, if you did not understand it like he wrote you, why didn't you frankly tell him that you didn't understand?
A. Because I didn't want to.
Q. Why did you want to conceal from him the purpose?
A. Didn't want to conceal it from him, but he had never come before me personally and made any claims, and I thought if he had any claims he ought to come and talk about it.
Q. And that is the reason you answered that way?
A. No, I didn't say that is the reason.
Q. Why are you saying that then?
A. Why, that is in part.
Q. You knew then that he was claiming an interest in the land, didn't you?

A. I knew that he was insinuating in that letter, you undertsand, and trying to get me to commit myself to something that would be beneficial to him some way, and I wouldn't do it.

Q. Why did you think he was trying to get you to commit yourself if you didn't think you was trying to take the land?

A. Get control of the land.

Q. Well, commit yourself in what way?

A. What he said led me to believe it, he was insinuating
334 facts that did not exist; as it is I answered back and gave him some encouragement like.

Q. Trying to make you commit yourself to what?

A. To the fact that it is a mortgage, and not a deed, not a conveyance.

Q. You knew he was trying to make you commit yourself to that fact?

A. I suppose he was.

Q. And you did know before this suit was brought that Mr. Holden was claiming that?

A. Let me understand about that; I don't know when this suit was brought. I don't know when the suit was brought. I wish somebody would tell me.

Q. Now in answer to that last letter of yours, I will ask you if you received this letter, referring to copy of "Exhibit 83:" (Reading:)

"KANSAS CITY, Mo., *March 5th*, '07.

"Dr. W. S. Woods, Pres. National Bank of Commerce, City.

DEAR SIR: In yours of the 20th ult. in reply to the suggestion contained in my letter of the 18th, you said you would 'have the matter looked up', and I have been hoping to hear from you. I am most anxious to get my affairs in shape, and I had a definite plan in view for what I suggested, which I think I could carry out, if I can be in position to act, but may lose by delay.

If, before you go away, it would be possible for you to advise me of the amount required, I would feel greatly obliged and relieved.

Your- truly,

(Signed) H. M. HOLDEN."

335 Q. Do you remember of getting that letter from him?

A. I do not.

Q. Don't remember that at all?

A. I don't remember but I expect I did.

Q. Well, dated March 5, 1907.

A. Yes, sir.

Q. If you did get that letter you know that he was claiming title to the land then?

A. I knew it was a very insinuating letter, and he triad to put up some kind of a job, and I didn't know what he was up to.

(By Mr. GARNETT:)

Q. Now I will ask you then if you did not make this reply to that letter, reading from copy of "Exhibit 84":

"Mr. Howard M. Holden, Kansas City, Mo.

DEAR SIR: I leave for California, probably to-morrow. I am awfully busy, but will wind everything up as far as I can, and try to leave it in the hands of some who can go ahead with it, if Mr. Pratt is not able to be here. I think, however, Mr. Pratt expects to be back Monday.

Yours very truly,

(Signed) W. S. WOODS, *President.*

Q. Do you remember writing that letter?

A. You are reading a copy of something I do not recall specifically.

Q. A copy of an exhibit in this case.

A. I say I cannot specify but I expect I wrote it.

Q. Did you make an arrangement with Mr. Pratt to furnish Mr. Holden the information about his indebtedness there?

A. I did not.

336 Q. You said you would try to leave it in the hands of some one who can go ahead with it. In whose hands did you leave it?

A. Mr. Holden's letter is very peculiarly worded, and so is mine; both of them may mean a whole lot and may mean nothing according to the way you look at it.

Q. In whose hands did you leave it? You say you would leave it in the hands of some one who can go ahead with it?

A. I don't recollect.

Q. You told him in the previous letter you would have the matter looked up?

A. Yes.

Q. Did you ever have the matter looked up to see how much was owing the bank?

A. I do not recollect.

Q. You have no recollection of ever looking it up?

A. No.

Q. The matter on your books to see how much Mr. Holden was owing the bank?

A. No, sir.

Q. On account of this transaction?

A. No, sir, I have not.

Q. Why did you tell him in that letter that you would have the matter looked up?

A. May have had a variety of reasons for it. None of your business what my reason is for anything.

Q. Well, all right, let it go at that.

A. Let it go at that.

Q. That is the only reason you can give, is it?

A. That I want to give now.

Q. Well, will you give any other reason at any other time?

A. No.

337 Q. Have you any other reason?

A. I decline to answer (Dep. 146-152).

—. Dr. Woods, you remember that the Interstate Trading Com-

pany gave the bank its note for that amount that was calculated to be due on this Holden debt; you remember that, do you?

A. My recollection is, Mr. Garnett, that we used the Interstate Trading Company to carry this note; we were to take probably their note for the money and carry it as bills receivable, the object of which I have stated to you before. (Dep. 153.)

Redirect examination by Judge ROBINSON:

Q. Now, was there anything said or any agreement entered into in any way, shape or form, as to what right Mr. Holden should have to sell that land, other than is set forth in the written contract dated May 12, 1904?

Mr. GARNETT: I object to that question as leading and suggestive, and calling for a conclusion, and as not being proper on re-direct examination. The witness has already stated that in his testimony, he has stated everything that he remembered, that was said between he and Mr. Holden.

(Question read by the notary.)

A. I think not, no.

Q. Now, Doctor, after talking to Mr. Holden about this matter, and agreeing to give him the right to sell this land and take as a commission all above what he could get for it above the amount of the bank's claim and interest, did you or did you not leave
338 the details in the matter of making the contracts to me and Mr. Patton to work out?

Plaintiffs objected to that question because the witness has already testified just what was said between he and Mr. Holden prior to making that written contract, and because the question suggests to the witness facts that were not testified to by him.

And plaintiff further objects to the question as leading.

(Question read by the notary.)

A. I have already stated that after agreeing with Mr. Holden what I would do and what he would do, I turned it over to Judge Robinson to get up the proper papers, finish the details (Dep. 158).

Q. Now when this land was deeded by Mr. Holden or his company to the Interstate Trading Company, when Mr. Patton delivered that deed, and the Interstate Trading Company made a note to the bank for the amount represented, would that in the usual and customary way of keeping the books of the bank, be carried as real estate or as bills receivable?

A. Carried as bills receivable (Dep. 163).

Q. Now, Doctor, some question was asked you about Mr. Holden's indebtedness or the indebtedness of the Holden Company to the bank. I will get you to state whether Mr. Holden or his company ever did owe the bank anything after that deed was delivered except rent and the proceeds of sales?

A. Did not.

Mr. GARNETT: I object to that question as calling for the
339 conclusion of the witness and a construction of all the evidence in this case.

Q. I will get you to state whether or not you ever at any time after that deed was delivered by Mr. Patton, who held it in escrow, to the Interstate Trading Company, asked Mr. Holden or his company to pay the bank anything whatever except the rent and the proceeds of sales that he had made as agent for the bank.

A. Did not.

Q. Did Mr. Holden or anybody connected with the Holden Company ever at any time after that deed was delivered by Mr. Patton offer to pay anything to the bank on any other account than as rent or the proceeds of a sale made by Mr. Holden as agent?

Mr. GARNETT: I object to that question, because the evidence shows that this property was conveyed to the Interstate Trading Company for the purpose of being sold to pay this debt; and object to it further because it calls for a conclusion as to how these different payments made by Mr. Holden were made.

A. Did not (Dep. 165).

Q. I want an answer to that question, whether or not that letter directed Mr. Winants to convey that property to the Interstate Trading Company or to the bank as its absolute property; what is your recollection on that subject?

Plaintiff's counsel objected for the reasons last above stated.

A. I don't think the word "absolute" was used, I think.
340 It is a plain letter to the effect to please deed the property over to the Interstate Trading Company or the bank (Dep. 167).

Recross-examination by Mr. GARNETT:

Witness states that he was Chairman of the Board of Directors of the Commerce Trust Company, which owned over 100,000 of the shares of the Terrace City Company (Dep. 170).

Also that he took the Patton note to represent the Mutual Benefit debt, "Because we were using Mr. Patton just as we used the Interstate Trading Company, it was a makeshift, we preferred to have Patton's note to the other as collateral (Dep. 173).

ELIJAH ROBINSON being produced on part of defendant deposed:

Direct examination by Mr. DEAN:

Says Mr. Holden had an abstract gotten up at time of loan from Insurance Company and furnished him copy. It was down only to date of abstract to the insurance company when it loaned the money. He didn't know but that "there might be some judgments against the company or some conveyances or anything of that kind," and he advised the bank not to cancel the insurance company note and mortgage, so that if any intervening liens the bank could shut them out by foreclosure (Dep. 174-175).

"The deed and the contract of May 12th, * * * were prepared and Mr. Holden had the deed up there in the bank to
341 deliver," he said I can sell that property in a certain time and if you put this deed on record it will hamper me. Then

it was "agreed to make an escrow agreement and put that contract and the deed and the deed from Mr. Winants and the note for six thousand and some hundred dollars and the note for $1,500—all those papers were put in Mr. Patton's hands in escrow," and escrow agreement was prepared as soon as he could get time and all the papers left in Patton's hands.

Cross-examination by Mr. GARNETT:

His recollection is that in any talk between him and Mr. Holden "all of these papers, the contracts and the deeds, were all put into Mr. Patton's hands in escrow." He embodied in the contract of May 14th "whatever he thought necessary to carry out the agreement and understanding of the parties." Does not know that, "it was never agreed that the contract of May 12th, should be put in escrow." "Don't have any recollection on the subject," whether the contract of May 14th, "provided that the contract of May 12th should be placed in escrow, cannot recall whether it was or not" (Dep. 175-177).

I tried to make it so clear and so plain and so strong that there could not be any question about it afterwards and I think I did (Dep. 179).

OMER E. ROBINSON, produced on the part of defendants, deposed:

Direct examination by Mr. DEAN:

He testifies. Had something to do with closing of some
342 sales of the land in Shawnee County, in which he acted as attorney for the National Bank of Commerce, made two trips to Topeka to close sales and foreclose a mortgage. Do you remember names of purchasers. Mr. Holden furnished the names to him. The sales had been made by Mr. Holden and the papers prepared by him. Holden had talked to him of the sales and was with him on one of the trips to Topeka.

When asked if Mr. Holden said anything to him or in his presence "regarding any claim of ownership of the land on his part," he replies, "Well, I would not be able now to state what, if anything, Mr. Holden said specifically about that"; that Holden brought him certain papers and asked him to look them over, said they were necessary to close the sales and relying upon that statement he took them to Jesse Rubey, Dr. Woods' son-in-law who had the matter in charge and who gave witness directions about it, "and we had them executed," and he went up there and closed them up with Mr. Holden and brought back the notes and money which were paid by purchasers. "As to Mr. Holden making any claims, I am not clear that he did or that he did not; I don't have any recollection much about that; he did not talk much to me about that feature of it." Says, he paid a commission for making the sales to Mr. Holden, says he procured the execution of the papers at instance of Holden, as being necessary to meet requirements of purchasers (Dep. 183-185).

343 Cross-examination by Mr. GARNETT:

Witness is shown copy of letter to him from Mr. Holden, dated Nov. 9, 1905 (see p. 126 this abstract), and asked if he remembers getting same, says it is his impression that he received it. Remembers names of the purchasers which letter gives prices and description of the various tracts. Does not so well remember about what is said about the Mutual Benefit matter as his interest was in the prices and the terms of the sales.

At that time he was an assistant attorney for the bank. Judge Robinson was the general attorney. Witness "had charge of these Holden transactions for a while, acting under Mr. Jesse Rubey." Discussed the terms of the sales and that letter with Mr. Rubey, "Mr. Rubey having charge of it, I naturally went to him." Thinks that the Topeka attorneys who examined the titles for the purchasers, made written requirements and that he saw them, or Mr. Holden with whom he was in frequent communication, told him of them. He was directed by Mr. Rubey to close the sales.

Witness is then shown copy of letter to him from Mr. Holden dated Jan. 3, 1906 (p. 131 this Abst.), and says he recalls receiving same, and says that it is very likely that he received the deeds and six releases and quit claims that are mentioned in the letter. Examined them as to their form and took them to Mr. Rubey, and he had them executed by the proper officers. Does not recall talking with anybody about them but Mr. Rubey.

344 Thinks that whatever commissions were paid went direct to Mr. Holden. One of his bills, introduced in evidence as Exhibit E, was shown to witness. He says, "Yes, I got the money on that $283.50 to reimburse me for money which I had advanced for the bank." He is asked about one of the items of that bill, $192.50 commission on sale Geo. C. Bills and who he paid that to. He replies, "I would say to Howard M. Holden," says he thinks he did not pay any commissions to George M. Noble (Dep. 185-190).

Redirect examination:

As to the interests of the bank in the property he knew of it "in the barest manner possible": He probably knew something of it either from Mr. Holden or Rubey or somebody. Took whatever papers he (Holden) submitted to him and had them executed to meet, as he understood it from him (Holden) the requirements of the attorney who had examined these titles for the purchasers. His examination of these papers was merely with respect to conveying the title to the purchaser and complying with purchaser's request whether reasonable or unreasonable as to the making of the title. Did all the business with Mr. Rubey (Dep. 191-194).

Recross-examination:

Knew that Mr. Rubey was exercising office of claim agent, looking after this matter, on his desk came all such matters for the bank and through him a great many of the collections of the bank were

handled. "I would report to him and discuss these matters with him. Made trips with him out of the city, looked at property in which the bank was interested.

345 Q. I am asking this question Mr. Robinson, if you didn't know when you got that letter, the attitude of Mr. Holden toward this land were not bound to know it from that language?

A. I do not want to argue the matter one way or the other. I cannot answer it now as to what impression, if any, that made upon me. I very likely disabused my mind of it the moment I had read it because I did not go into that phase of this matter then and at no time.

Q. You said that you simply directed the officers of the bank to sign any documents that Mr. Holden presented there?

A. No, no; I have not so said and do not so state.

Q. It was your duty or wasn't it your duty to look after these papers and see whether they should be executed or not?

A. Yes, sir, look after these papers, that is true (Dep. 194-196).

Warranty deed J. D. Basye and wife to W. H. Winants was introduced in evidence by defendants and marked Exhibit D-115, dated May 1, 1901, recorded May 6, 1901 Book B-777 page 307, to 110 acres in Jackson County, Missouri, con. $12,500 subject to deed of trust executed by said Basye and wife on June 5, 1897, to Rosenberg trustee for Patrick Corrigan to secure a note for $4,200 (Rec. 850).

Also by defendants quit claim deed receiver National Bank of Commerce to Terrace City Realty & Securities Company to lands in controversy and other real estate, dated 25 March, 1908, filed for record 31 March, 1908, recorded in Book B-1115, page 433 (Rec. 854).

346 Also by defendants, three quit claim deeds Inter-State Trading Company to Terrace City Realty & Securities Company to lands in Shawnee County, Kansas, marked Exhibits D-117-118-119 (Rec. 865).

Also by defendants, contracts of May 12th, and May 14th, 1904, and bill of sale marked Exhibit- D-120-121-122 (Rec. 873).

Mr. DEAN: I now offer in evidence release deed from the National Bank of Commerce to the Holden Land and Live Stock Company and Howard M. Holden, mortgagee, dated July 1st, 1901, amount of $82,000 recorded on page 126, Book 284, of mortgage record in Shawnee County, Kansas, being a release of the Holden Land and Live Stock Company mortgage of $82,000 on the Shawnee County land, together with certificate of registration signed by the register of deeds of Shawnee County.

Mr. GARNETT: We object to this paper and the statement, it is a release of any mortgage, it is not what is meant to be a release of any mortgage.

The COURT: It will be received for whatever it is worth.

To which ruling the plaintiff at the time duly excepted and still excepts.

The deed in question was marked Exhibit D-123, and is in words and figures as follows:

Satisfaction of Mortgage.

Holden Land and Live Stock Company a corporation, mortgagor to Howard M. Holden, mortgagee, National Bank of Com-
347 merce of Kansas City, Missouri, assignee, dated July 1st, 1901, amount $82,000 recorded on page 125 Book 284 of Mortgage Records in Shawnee County, Kansas, on property described as follows, to-wit:

(Then follows description of property in Shawnee County, Kansas.)

In witness whereof, the said party of the first part has caused these presents to be signed by its president and attested by its secretary, and the common corporate seal to be hereto attached the day and year first above written.

THE NATIONAL BANK OF COMMERCE
OF KANSAS CITY,
By W. S. WOODS, *President.*
W. A. RULE, *Secretary.* [SEAL.]

Acknowledged 15 January, 1906, before H. G. Craig, N. P. filed Jan. 20, 1905, recorded Book 314 page 475 (Rec. 885 to 889).

Also by defendants lease National Bank of Commerce to Holden Land and Live Stock Company, of lands in Shawnee County, Kansas, dated 16 Feb. 1905, marked Exhibit D-124 (Rec. 889).

Also by defendants lease Pete R. Noel of house on 110 acres, dated 28 Feb., 1907 (Rec. 894).

Also by defendants letter from H. M. Holden to W. H. Winants, dated May 10, 1904 (Rec. 898).

Also by defendants papers regarding taxes on Jackson County land (Rec. 899).

Also by defendants check against Holden collateral ac-
348 count July 12, 1905, favor J. W. Rubey, $57.92 with bill Daily Record $22.92 and J. C. Rosenberger $35 (Rec. 900).

Also by defendants notices to tenants of Shawnee County lands, of expiration of leases, said notices signed by Inter State Trading Company, but not by Holden Land and Live Stock Company (Rec. 901).

Also letters from I. L. Betzer marked Exhibit- D-134-135-136-137 (Rec. 906).

Also three letters unsigned said to be from W. S. Woods to H. M. Holden marked Exhibit- D-138-139-140.

Also introduced by defendants letter H. M. Holden to W. H. Winants dated Dec. 23, 1903, marked Exhibit D-141. The letter is as follows:

KANSAS CITY, MO., *Dec.* 23, 1903.

DEAR MR. WINANTS: I wrote enclosed note last evening intending to send it to your room, but thought that you had company and so refrained. This morning, I was not well enough to get out and do not think I can well leave the house today. Please speak to Mr. Patton as requested. If I am able I will see him this afternoon or

tomorrow. Also please mention the matter to Dr. Woods as I do not wish him to think me indifferent. It is constantly on my mind.

I wanted to talk of what I will write of in this letter. I am disturbed over being behind hand at the bank. Dr. Woods and the bank have been so kind to me, that I want to show my appreciation by my acts. Heavy losses in cattle during the last year, and experience in common to all in the business, curtailed my entire
349 resources for the time and I set about selling enough land last spring to clean me up at the bank. But soon the flood came along and paralized the land market in our section for the time being and then the close money market of the fall, so that I have not made any sales. The situation is improving, however, and I am confident that, after the new year opens, I shall be able to make sales enough to greatly reduce the bank debt, or wipe it out altogether, which is what I want to do.

Bartlett Bros., St. Joseph, agents for the Mutual Benefit, made for that company a careful appraisement of each separate tract, a copy of which is in my papers in the bank. Deducting the tracts and leaves 4,942.80 acres, their valuation of which is $213,026.45. The Mut. Ben. debt is $73,000. Balance $140,026.45.

That Basye land which is in your name, 110 acres, is certainly worth over the 4,000 that is against it, $20,000. $160,026.45.

Then there is the coal mine security in addition and my debt to the bank is about $67,000, deducting collateral notes for sales. Under any possible conditions, the security is more than 2 to 1.

As to the coal mine, mining by machines came to be considered indispensible. They are very successful at Lexington, Higginsville and Leavenworth. The machine we bought proved not to be just the thing for our mines, but by changes in its construction in some respects it is doing much better and we now feel quite sure that the corner has been turned and that from now on we shall have good results. I can readily sell the mine to good advantage so soon as success with machines is proven and that I want to do. There is no reason why they should not succeed there as well as the other points I have named where they are now making large money for the operators, but at each of those places they went through much the same experience as here. It seems to take some time to get the machines and the mines adjusted to each other. Of course
350 while the bank is abundantly secured otherwise, it is to its interest that we should succeed.

We need a little help to carry us through this period with the Coal Company. It takes quite an amount to run the business, considerable of the sales being on credit. Meantime, we have pay rolls to meet and current bills. I hesitate to mention it, but in view of the abundant security and the legitimate need in carrying the coal matter through to success I wanted to ask if the bank would not probably be willing to tide us over with a further advance strictly for the purposes named, to a very moderate extent. I feel like mentioning it to you and getting your views on the subject. If you feel like doing so would you kindly speak to Dr. Woods about it and let me know. He has been so uniformly kind to me that I almost shrink

from speaking to him about it, but perhaps my present disabled condition has something to do with that.

Pardon the imposition of this long letter on you, written so poorly. I will try to call you up about 1:30 by the phone and you may have had a chance to talk with the doctor by that time.

Very truly,

H. M. HOLDEN.

(Above documents Rec. 850 to 912).

HOWARD M. HOLDEN, recalled on December 1, 1909, for further cross examination on behalf of defendants:

Testifies regarding taxes paid by him on lands in Shawnee County, Kansas and Jackson County, Missouri (Rec. 913 to 916).

351 M. H. HOLDEN, recalled on December 10, 1909, for further cross examination, on behalf of defendants, testified:

Lease signed by Interstate Trading Company dated November 29, 1904, to Holden Company which witness refused to sign, referred to and question asked, "when you refused to sign that lease, the Interstate Company immediately served notice on the tenants on the farm that the leases which they had would be terminated on 1st of March, 1905, the leases which they held from the Holden Company, didn't they, these notices that I introduced the other day?

A. You introduced some notices to the tenants which purport to have been served upon them, and I suppose they were. I wish to say, however, that while the name of the Holden Company is printed in those notices, it was absolutely without my authority and is unsigned excepting the words, "The Holden Land & Live Stock Company, by President," and they never could have gotten me to sign them, and I charge that as a forgery in using the Holden Company's name by which to mislead the tenants in supposing that company was a party or that I was a party to those notices.

Q. The facts are, Mr. Holden, the Holden Land & Live Stock Company refused to join in those notices didn't they?

A. To the best of my knowledge I knew nothing about their having been gotten up. It is possible I may have been asked to sign them, but I don't think I was, I had refused if I was asked.

352 Q. So then a controversy existed after the delivery of these deeds in the fall of 1904 over the possession of this land, the Inter State Trading Company demanding possession of the land and you refusing to deliver it over, isn't that true?

A. I don't think I would dignify it by the name of controversy, they made certain movements which were not justified by the understanding between us, and in such movements I repudiated and refused to become a party to.

Q. And refused to recognize their right to the possession of the land?

A. Emphatically I did, if there was any occasion for doing it.

Q. Well, they demanded you to execute a lease, didn't they, at that time, which you refused to execute?

A. You are referring to the lease that was signed by the Inter State Company?

Q. I refer to the lease that covers the time between the fall of 1904 and March of 1905?

A. It was never executed by me. I wouldn't execute it, I don't know how far it was pressed upon me, I know so far as it came to me to recognize and become a party to it, I absolutely refused to do anything of that kind.

Q. Previous to that time you had consulted an attorney by the name of Scarritt in Kansas City in regard to your rights, hadn't you, and submitted these contracts of May 12th, 1904 to him?

A. Very briefly, but when I learned through some source, I don't recall how it was, that the bank or the Inter-State Company had recorded my deed to that company, I regarded it as a viola-
353 tion of our understanding, being an encroachment upon the time that the agreement of May 12th expressed in which I should have control of the property, the selling of it or at least a partial control—the Inter-State Company retained also the right to sell it, and I didn't like it. And that was only part of the situation as to the respective rights of the parties in any event to record the deed, and the contract of May 12th was a part of the transaction, the other half of it, and it occurred to me it was time for me to show up my end of it if they were putting that deed on record. Putting the deed on record, I felt the rights might be acquired there without a knowledge of the contract and for the first time I thought I better talk with an attorney regarding this matter and I went to Judge Scarritt who had been my attorney on some other matters entirely, and I showed him the contract of May 12th, and told him about the deed having been put on record and he looked it over and said to me it was nothing but a mortgage relation, and you had better file the contract, and dictated to me that addendum that was written. I don't think I was with him more than half an hour perhaps.

Q. Following that the Inter State Trading Company presented you this lease which you refused to sign?

A. Yes, I think that is the case, because the contract was recorded I think on November 9th, if I am not mistaken, and that lease that they wanted is dated I think November 29.

Q. Following that the Inter State Trading Company
354 served notice o nthese tenants at the expiration of their leases at the end of their term which would be March, 1905?

A. That appears to be the case from those papers which you introduced.

Q. And that controversy was settled finally by you signing a lease to the National Bank of Commerce for this land in which you agreed to pay $10,000.00 rent for it from March 1905 to March, 1906, wasn't it?

A. I don't think I would admit that was the legal conclusion as a matter of fact.

Q. Following that controversy you executed that lease?

A. At a later date I executed it, I don't think it had any connection with the previous matters you have spoken of.

Q. You know they were threatening to sue you or bring suit for the possession of the land, the Inter State Trading Company?

A. No, sir; I know nothing of that, in fact they seemed to haul in their opposition and recognize my rights as I interpreted them, their whole conduct was that way.

Q. You say when these deeds were recorded you then recorded the contract of May 12th, 1904, which was your side of the contract?

A. Yes, sir; recorded it.

Q. You say that contract?

A. The contract was mutual, it was their side as well as my side, I recorded it.

Q. So that the contract of May 12th and the deeds were all one transaction?

A. Yes, sir; I so regarded them.

355 Q. You made a statement of this case to the receiver of the National Bank of Commerce, didn't you, in the year 1907, was it?

A. Or 8, I don't know which he asked me to make him a statement of the facts.

Q. I will ask you if the papers which I hand you is the paper which you made out as a statement of the facts in the case and delivered to the receiver of the National Bank of Commerce?

A. I think I wrote that, dictated it and wrote it at his request.

Q. The statement made by you to the receiver of the bank was true, wasn't it?

A. I intended them to only express what was true. I might at the time have been mistaken in the lapse of several years having existed. I might have said something that after further knowledge later on I would see was an error perhaps but nothing of that kind in my mind however.

Q. You gave careful consideration to that statement before you wrote it out, gave it careful consideration before you delivered it to the receiver?

A. Well, just ordinary consideration, he asked me—I was in his office talking with him and I had some little memoranda which was unintelligible to anybody but myself, and as I was leaving he asked me to leave those with him and I told him they would not be intelligible to him and I told him I would write him a formal statement which I did the same day and gave it to him (Rec. 917-923).

Extracts from the statement are then read to witness and he is asked if he made them and he states that he did.

356 Q. Now the reason you believe this transaction to amount to nothing more than a mortgage was the legal construction placed upon these contracts by your attorney, Mr. Scarritt, wasn't it?

A. Not altogether so, I thought so all the time.

Q. And your own judgment as to what the law was under such circumstances?

A. To an extent and from all the conduct and language expressed by the bank and the persons I came in contact with from the time these papers were executed (Rec. 927-928).

Here defendants rested their case.

Plaintiff's Evidence in Rebuttal.

H. M. HOLDEN recalled on behalf of plaintiffs.

Direct examination:

Mr. GARNETT: Mr. Dean, will you let me have the paper from which you have been reading?

(Statement by Mr. Holden to receiver, Cutts.)

Mr. DEAN: Yes, sir.

Mr. GARNETT: I now offer this paper in evidence as being the complete statement of the witness about which he has been cross examined by counsel on the other side.

Defendant's counsel opposed its admission but court overrules objections.

The paper was offered in evidence and marked C. 142. (Rec. 930.)

Witness testified he never had any conference with any officer of the Interstate Co. about possession of the land; that the
357 lease that he didn't sign was presented by Mr. Patton; that neither the Interstate Co. nor the bank nor any of its officers took any other steps to obtain possession or ever demanded possession of the property. They never made any demand for the 110 acres, never said anything about it; he held it in undisputed possession, unqualifiedly for years afterwards. In Jan., 1907, he consented, at Dr. Woods' request, that the rents might be collected by Mr. Donnelly (Rec. 944-5). He was not asked to sign the notices to the tenants on Shawnee County lands in Nov., 1904, and never authorized the typewritten name of the Holden Co. to be attached to the notices.

Witness is asked why, in preparing notes and mortgages for deferred payments of purchase money for land sold, they were made in favor of the Interstate Trading Co., and he states:

"I did it because the Interstate Trading Co. held the title in trust and the lands when sold, the money went to the bank and the notes to the Interstate Trading Co., to be collected and the proceeds paid over to the bank in liquidation of the debt. I understood the Interstate Trading Co. was brought into the transaction for that purpose."

No part of the purchase money notes was to come to him until the debt was paid (Rec. 948-950).

The Corrigan mortgage on the 110 acres in Jackson County, Mo., was taken up by the bank June 3, 1905, and the amount paid was $4,726.24. William H. Winants' deed to Interstate Trad-
358 ing Company, dated May 17, 1904, and acknowledged May 17, 1904, and recorded in Recorder's office of Jackson County, Mo., at Kansas City, in Book B 927, page 325, conveying the 110 acres in question offered in evidence. No request by bank to have Holden's wife sign any quit-claim deed to 110 acres.

The mortgage spoken was not signed by witness. It was signed by James D. Bayse, the former owner.

Had nothing to do with preparing contract of May 5, 1904. Re-

fused to sign that contract. Asked why he signed the May 12, 1904, agreement, witness said:

A. Well, the bank had been very persistent between those dates in its threats to sell out the collaterals under the power of sale in the note, and I was unable to dissuade them from doing it, and they pressed the matter and I was convinced that they intended to do so, and that was the moving cause. I felt that I was in their hands, and I had to comply with their requirements, and in connection with the agreement of May 12th, which qualified the deed and with the assurances that were repeatedly made by Mr. Patton to me, that all the bank wanted was to get the matter in the form that they would have power in their hands to sell the property and realize upon the indebtedness in case I failed from any cause. I was led thereby and all those considerations to assent to the execution of the deed. I hadn't any chance to do otherwise and was supposed that was the——

Mr. DEAN: I object to that.

A. (Continuing:) My understanding then was——

Mr. DEAN: I object to his understanding.

359 The COURT: Sustained. His understanding as to what the contract meant wouldn't be admissible unless that understanding was based on something that was said at the time.

The WITNESS: It was so based.

The COURT: The understanding wouldn't be competent anyway.

To which ruling the plaintiffs at the time duly excepted and still except.

Q. There was something said about the threat of the Mutual Benefit people to foreclose the mortgage in the testimony; I will ask you if that threat had any influence on you in causing you to sign the deed and contract?

A. No material influence, because I knew it would be several years before they could get to the conclusion of such a proceeding, and during that time I could, from the sale of land and other resources pay them off and pay the bank off also. I preferred they should not start such a proceeding, but I was not seriously influenced or affected by their doing so (Rec. 955-956).

Q. When the bank advanced for you the $6,253.30 to reinstate that Mutual Benefit mortgage and required you to sign a note for that amount, I will ask you what was done with the note when you signed it, if you know?

A. Left in Mr. Patton's hands.

Q. Where was that note signed?

A. In the National Bank of Commerce at his desk on the morning of May 12th, that is, before noon, he either sent for me to come to the bank or I went, having received this copy of a letter from Mr. Betzer.

360 Q. You say that note was left with Mr. Patton in the bank?

A. Yes, sir.

Q. Did you after that see the note at any time during these negotiations?

A. Did not, until it was delivered to me a year and a half or so afterwards through Mr. Moore.

Q. There was a letter introduced in evidence here to Dr. Woods, dated August 27th, 1903, in which you speak of your illness, not being able to attend to business, I will ask you what the condition of your health was at that time, Mr. Holden?

A. It was very much impaired for about a year and a half, part of 1903 and '4 and running into 1905, the first time in my life I was afflicted with sudden spells of vertigo, which came without a moment's warning and practically disabled me while it lasted, which is usually about three hours. I recollect there were forty consecutive days when I had those attacks. My weight ran down something over sixty pounds (Rec. 961-962).

Under order of court for examination of books and papers procured copies of notes of Interstate Trading Co. dated May 12, 1904, and Nov. 12, 1904. Same introduced in evidence, and are as follows:

* * * * * * *

Copy.

$83,675.32. KANSAS CITY, MO., *May* 12-04.

On November 9th, 1904 we promise to pay to the National Bank of Commerce of Kansas City, Mo. or order, Eighty three
361 thousand, Six hundred and seventy five and 32-100 Dollars at the National Bank of Commerce, Kansas City, Mo. with interest from date, payable annually, at eight per cent per annum. If not so paid, compounded.

Value received.

THE INTER STATE TRADING COMPANY.
By H. WILSON PRATT, *President.*

Interest figured $3,421.38.
83,675.32.
87,096.70.

* * * * * * *

Q. Look at this and see if that is a copy of the note with endorsements dated November 12th, 1904?

A. It is, I make the same statement as to that, how I saw the original as I did to the preceding note.

Mr. GARNETT: I offer this note in evidence.

The note in question was marked Exhibit C-146 by the stenographer, and is in words and figures as follows, to-wit:

* * * * * * *

Copy.

$87,096.70. KANSAS CITY, MO., *Nov. 12th*, 1904.

One year after date, we promise to pay to the National Bank of Commerce of Kansas City, Mo. or order, Eighty Seven Thousand

ninety six and 70-100 Dollars at the National Bank of Commerce, Kansas City, Mo. with interest from date, payable annually at the rate of Eight per cent per annum.

If not so paid, compounded.

THE INTER STATE TRADING CO.,
By H. WILSON PRATT, *Pres't.*

Value received.
Due Nov. 15-05.

362 Endorsements: Int. Paid to 1-31-06. 2-9-06. Dr. Collat. A-c. H. M. Holden. Credit Feb. 9-06, $24,000. Dr. Collat. A-c. H. M. Holden. Credit M'ch 30-06, $23,096.70. 3-30-06. Dr. Collat. Acct. H. H. Holden. Int. paid to and inc. July 31-06. Int. paid to and inc. Oct. 31-06. Int. paid to and inc. Jan. 31-07. Credit May 3-07 $24,000. Int. paid to and inc. July 31-07. Int. paid to and inc. Nov. 30-07.

* * * * * * *

Q. Mr. Holden, Mr. Wheeler testified something about going up to the Shawnee County farms to see about some corn and some shipments?

A. Yes, sir.

Q. In what year was that corn raised, do you remember?

A. 1906.

Q. Did that corn have anything to do with your obligations for the rent of 1905 for which you would have paid for that year?

A. Did not.

Q. Did, or did not any portion of the crops raised on the farm for 1905 go to the purchasers of that year; some of this land was sold in 1905, did the purchasers receive any part of the crops raised for that year?

A. They did, the land sold to Hundertpfund and Mitchell, those transactions were both agreed upon early in the spring, in the spring of 1905, but after this lease was made for $10,000.00 and the entire income from the Hundertpfund land, 160 acres,
363 that year went to him and a part of the crops to Mitchell on the land he bought. They bought before the crop season commenced and by all precedent they would be entitled unless some special agreement to the contrary, to the crops for that year.

Q. In other words, Mr. Holden, the land included in the lease, 1905, part of the land had been sold to parties who had got the crops for that year?

A. Sold shortly after the lease was made, agreed upon.

Q. And those parties got the crops for that year?

A. Hundertpfund got the whole and Mitchell part.

Q. How much of the land had you sold before the 1906 crop came in?

A. There had been 1220 acres and a fraction sold before the 1906 crops came in and for $61,915.75, that is what we realized from those lands so sold. The statement made to Mr. Cutts, Exhibit 100 shows all that.

Q. Mr. Holden, Dr. Woods has testified he had an arrangement with you whereby you would give him a proportion of the crops raised for 1906 for rent for that year, I will ask you if you had any such agreement with him?

A. Did not, that is, if he means the share of the physical crops, like a part of the grain, doesn't make any difference, just as long as it is broad, whether I sold it and paid him the money or he got the corn or wheat or whatever it was turned over to him, but there was no such arrangement at all, it went right along and I had agreed myself to turn over to the bank the land owner's share of the income, and that I did.

364 Q. I will ask you if you kept out any part of the proceeds of the income of the land for 1905 yourself, personally?

A. I did not.

Q. I will ask you if it is a fact that you turned over all the proceeds of that year to the bank?

A. I did.

Q. I will ask you if you kept out of the proceeds of the crops and rent for 1906 any sum of money whatever?

A. I did not.

Q. Did you or did you not turn over the entire proceeds that came from the land that year?

A. Yes, sir; I did.

Q. Do you remember the amount you paid to the bank from the crops of 1906?

A. $5,505.78 after those sale of 1220 acres.

Q. You had this land rented to some sub-tenants on shares?

A. Yes, sir.

Q. The amount then you turned over was the part that came to you as landlord, and not their part of it?

A. That is the case, I had nothing to do with their part of it, it belonged to them (Rec. 965-969).

Had no talk with Mr. Rubey before beginning to sell lands in 1905. Had no talk with him about leases. The arrangement was made with Mr. Patton before he came in (Rec. 973).

Q. Did the bank know about the destruction of that crib by the tornado?

A. They surely did, they knew perfectly well we had rebuilt that crib, that there was a tornado there and demolished the crib

365 and we rebuilt it and they paid none of the expense of that whatever or for anything else from first to last, except putting on that roof which was totally unnecessary as we expected to ship the corn in a short time and expected to sell that piece of land, but I suppose they had an object in view besides the preservation of the corn. If it had been necessary we could have put it on ourselves. Ear corn is not injured as a rule——

Q. I will ask you if it is customary in handling of ear corn to roof the crib before shipment?

A. It usually is because the crib is a permanent structure, but it is not uncommon for corn to be cribbed; without a roof; they have portable wire cribs that have no roof at all; they are often used temporarily (Rec. 971-972).

—. The arrangement for the lease you say was made with Mr. Patten?

A. He came to me and came to my office and saw me and told me they wanted—I think he mentioned Dr. Woods' name—wanted an arrangement, whereby they could get the income from the property and I readily assented to it, it was paying so much of my debt by doing it.

Mr. DEAN: I move to strike out the answer as not responsive and incompetent, irrelevant and immaterial (No ruling).

Q. What did you tell Mr. Patton?

A. I told him I was perfectly willing to do it and to get up any papers they desired. Next thing I heard was from Judge
366 Robinson stating he had a lease in his hands prepared and enclosing a resolution which he wanted me to have the board of directors of the Holden Company pass, authorizing the lease, and that is the whole story about that lease. I never talked with Dr Woods about it and that is all that transpired on that.

Mr. DEAN: I still insist on striking out the former answer of the witness.

The COURT: The former answer will be stricken out as not what was said to Mr. Patton. To which ruling the plaintiffs at the time duly excepted and still except.

Q. Did you have any talk with Judge Robinson before you signed that lease, any negotiations with him?

A. No negotiations. I would like to add, when I received that resolution which he wanted executed it was done and I then went with Mr. Patton to his office and there the resolution was delivered and the two copies of the lease exchanged.

Q. Mr. Rubey testified something about an arrangement he made with you to sell the land up there. I will ask you if you ever had any arrangement with Mr. Rubey or ever talked with him about selling these lands on commission?

A. I did not, nor with anyone else.

Q. Briefly state to the court what your arrangement was with the bank about selling those lands?

Mr. DEAN: I object to the question as incompetent, irrelevant and immaterial and a matter which has been wholly covered by the previous evidence.

The COURT: State what was said between you and the officers of the bank on that subject?

367 A. Early in January 1905, Mr. Patton came to me and said the bank was now willing to make releases for partial sales, they had before that refrained from giving me any such chance to sell except en masse.

Mr. DEAN: I move to strike the answer out as not responsive.

The COURT: State what was said.

Q. Up to the time Mr. Patton told you the bank was willing you should make partial sales and they make releases had there been any

expression from any officer or agent of the bank to the effect that you were permitted to make any partial sales?

A. There had not been.

Q. How long was that before Mr. Rubey came into the charge of these matters?

A. Oh, it was two months and more, perhaps two months and a half, I don't remember the exact date Mr. Patton came to me and opened the door, the interview I remember was very short, except to tell me to go ahead and make partial sales and I did so energetically from that time on. There was never any talk about commissions at that time.

Q. Did you ever have any talk at any time with Dr. Woods or Mr. Rubey or anybody about the charge of any commissions for the sale of the land?

A. I never did.

Q. Dr. Woods said something about the commission being net to you, and that you would pay for the abstract and all other
368 expenses to come out of the commission, I will ask you if you ever had any talk of that sort with Dr. Woods?

A. I never did; it is a pure fabrication (Rec. 974-977).

Had no arrangements with Mr. Rubey in regard to selling land.

Q. Have you any receipts of commission paid any agency with you, Mr. Holden?

A. I have one, I believe I have it here, the receipts were delivered to the bank. I know of many of them having been delivered, but the only one that I have is this one of George M. Noble & Co. for $349.55 on sales to La Fontaine, March 7th, 1907.

Mr. GARNETT: I offer the receipt in evidence.

Mr. DEAN: I object to the offer as being incompetent, irrelevant and immaterial.

The COURT: Overruled. To which ruling the defendants at the time duly excepted and still except.

The receipt in question was marked C-148 by the stenographer, and is in words and figures as follows, to-wit:

* * * * * * *

TOPEKA, KANSAS, *March 7th*, 1907.

Received of Howard M. Holden of Kansas City, Mo. the sum of One Hundred and Twenty-four and 75-100 Dollars ($124.75), being commissions for the sale of all that part of the Southeast Quarter of Section 1, Township 11, Range 13, in Shawnee County, Kansas south of the right of way of the Union Pacific Railway.

Also received of Howard M. Holden the sum of Two Hundred and Twenty-five Dollars ($225), being commissions for the sale
369 to Henry J. La Fontaine of that part of the East Half of Section 1, Township 11, Range 13 north of the Union Pacific Railway.

GEO. M. NOBLE & CO.

Noble's receipt La Fontaine Com.

* * * * * * *

Q. How did you happen to have this receipt, Mr. Holden?

Mr. DEAN: I object to the question as being incompetent, irrelevant and immaterial.

The COURT: Overruled. To which ruling the defendants at the time duly excepted and still except.

A. It was because of the letters which Dr. Woods as president of the bank wrote to the Bank of Topeka here which have been introduced I think dated March 5th, in which he inclosed blank form of receipts and instructed the bank to have me sign them and me only for the commissions. There were two other sales covered by—two other parties, covered by the letter of Dr. Woods. When I came to the closing of the transaction and meeting the parties here for the purpose, on March 7th, this receipt would have been delivered. Mr. Noble was there in the bank with me, but Mr. Thurston showed me, the cashier, this letter of Dr. Woods containing his definite instructions, and he felt himself obliged to have it complied with and I signed the receipt myself for the commission on those sales, this is one of them (see page 221 this Abstract).

Q. There have been introduced some receipts in evidence
370 for payment of taxes in 1906, I will ask you to explain, if you can, why these taxes were not paid by you before that time?

A. Which property?

Q. 110 acres?

A. Because I was short of money and delinquent taxes in Missouri outside of the city, that was outside of the city then, and they only drew 12 per cent penalty, and if a man was short of money he would let them go for a while. I kept watch of them, the bank didn't pay them for several years afterwards and finally did pay them, as mortgagee, I suppose.

—. ——.

The WITNESS: But I have paid some of them since, notwithstanding Mr. Dean's statement.

Tax receipts Ex. C. 149 introduced in evidence (Rec. 979-981).

Q. I will ask you, Mr. Holden, if you have investigated this statement which was handed us by counsel on the other side and which was not received in evidence, and if you find any portion of the taxes which it is claimed to be paid by that statement, had been paid by you, you paid part of the taxes?

A. Yes, sir.

Q. Mr. Holden, I call your attention to the fact that Dr. Woods testified he had paid all the taxes on this land to the present day, the bank had, I will ask you if you paid any of the taxes?

A. I have.

Q. Look at this receipt and tell the court if you paid taxes on that?

A. Yes, sir; I went to the collector's office to pay the taxes, all the taxes on that land for that year and I found that some-
371 one had been there a day or two before and had paid it. There were several tracts and I found some there had been no taxes paid and I paid it, here is the receipt, $13.20.

Q. Judge Robinson testified or rather intimated in his testimony,

there was something said about you deeding that property in payment of the debt at the time you were closing up these contracts, I will ask you if you ever made any statement of that kind at all?

Mr. DEAN: I object to the question as incompetent, irrelevant and immaterial, and because the contracts contain the only relevant evidence of what the transaction was.

The COURT: Overruled. To which ruling the defendants at the time duly excepted.

A. I did not.

Q. I will ask you if any statement of that sort was made by anyone of the bank's agents or employés or by yourself or any one of them in any of these negotiations?

Mr. DEAN: I object to the question as calling for incompetent, irrelevant and immaterial testimony.

The COURT: Overruled. To which ruling the defendant- at the time duly excepted and still except.

A. Never was.

Q. Was there anything said at any time between any of you about making a deed to that land in satisfaction of that debt?

A. There was not.

Q. Judge Robinson testified when you came to execute and deliver the deed that you requested the time for selling the land to be
372 shortened from six months to two months, I will ask you if you made any such request?

Mr. DEAN: I object to the question as not a statement of the statement Mr. Robinson made and as incompetent, irrelevant and immaterial.

The COURT: Overruled. To which ruling the defendant at the time duly excepted and still excepts.

A. I certainly never did, too absurd to consider.

Q. I will ask you if anything was said at that time about putting any of these papers in escrow on May 12th?

A. There was not on May 12th.

Q. I will ask you if the contract of May 12th was ever put into Mr. Patton's hands, agreement of May 12th?

A. No, sir; we have it today, here it is, been in my hands ever since from May 12th when it was delivered to me, on the afternoon of May 12th in Judge Robinson's office.

Q. Did you ever have any agreement, written or otherwise, by which that was to be put in escrow?

A. Never.

The COURT: Was one of those left with Mr. Patton?

A. I think so, each party held a copy.

Q. I asked you if one of these was left with Mr. Patton?

A. In escrow?

Q. Yes?

A. I don't know what they did with theirs, on the afternoon of May 12th I delivered a deed and the other papers that were to be

delivered and received a copy of that. Those were executed
373 and each party took his copy of it.

Q. I will ask you then, Mr. Holden, if either this or the bank's copy was placed in escrow at any time to your knowledge?

A. Not to my knowledge, that never was, it has been in my hands ever since, never out of my hands.

Q. I believe I asked you when you first heard of the May 14th agreement and I believe you testified you didn't hear of that until May 14th?

A. That is the case.

Q. Judge Robinson said something also in his testimony about you requesting that the deed to the Inter State Company be kept from record, do you remember anything of that sort?

A. I do not, I may have suggested it, but I didn't care anything about it and there was no formal request made it should be done.

Q. I will ask you, Mr. Holden, if the placing of those deeds on record in any way interfered with your selling of the land?

Mr. DEAN: I object to the question as calling for incompetent, irrelevant and immaterial testimony.

The COURT: He may answer. To which ruling the defendants at the time duly excepted and still except.

A. Not in the least, it was on record and I made all of these sales in the face of it subsequently.

Q. When Mr. Patton presented that agreement of May 14th, I will get you to recall if you can, what was stated by him as his
374 reason for wanting you to sign that?

Mr. DEAN: I object to the question as being incompetent, irrelevant and immaterial, the contract itself is the whole evidence on the subject.

The COURT: I think Mr. Holden testified at length about that.

Q. I will ask you as a matter of fact, Mr. Holden, if you put up into Mr. Patton's hands any deed or contract in escrow?

A. I never did.

Mr. DEAN: I object and move to strike out the testimony because the contract of May 14th is conclusive on that subject.

The COURT: The answer may stand as giving his version of it.

To which ruling the defendants at the time duly excepted and still except.

Q. Mr. Holden, Dr. Woods has testified that after the original note of $80,000.00 became due he was constantly after you for the money, I will ask you if that is a fact?

A. It is not a fact.

Q. Did he ever demand any payment of that $80,000.00 note until after the flood?

A. He did not.

Q. I will ask you if you had any conversation with him after maturity of that note about its being extended?

A. Oh, yes.

Q. What did he state about, as to whether it was satisfactory to carry the indebtedness?

A. I remember asking him as near as I can recall, about two months before the maturity, first maturity of the note which
375 was July, 1902, with a view to making other arrangements regarding the note in——

Mr. DEAN: I object to what his views were as incompetent, irrelevant and immaterial.

The COURT: Overruled.

To which ruling the defendants at the time duly excepted and still except.

A. (Continuing:) With a view to taking care of my obligations.

Mr. DEAN: I move to strike out what his obligation was.

The COURT: State what was said.

A. (Continuing:) I went to Dr. Woods some weeks, I think about two months before the note matured, looking ahead to its maturity and desired to make other arrangements if he wanted it made, and he said it was perfectly agreeable to let it run on for a while if I desired it, and so it did run on and I paid the interest every month in advance right along and so well satisfied was he——

Mr. DEAN: I object to that.

The COURT: State what he said.

Q. I will ask you if it ran on that way up until the time of the flood?

A. It did.

Q. Up to that time did Dr. Woods or any officer of the bank ever demand payment of that note of you?

A. They did not.

Q. I will ask you if you remember of making some sales of land just before the flood?

A. I do.

Q. What time of the year was that?

A. They were closed in April, purchased in March.

376 Q. I will ask you if you paid all the proceeds of those sales over to the bank?

Mr. DEAN: I object to the question as incompetent, irrelevant and immaterial, and because it has all been testified to.

The COURT: Let him answer.

To which ruling the defendants at the time duly excepted and still except.

A. I did not.

Q. Or to the Mutual Benefit Company?

A. Did not.

Q. Did you have any talk with Dr. Woods about keeping out any part of those sales?

A. I did.

Q. What was said between you?

The COURT: What is this rebuttal of?

Mr. GARNETT: Dr. Woods testified he was continually after Mr. Holden to pay this debt and he was tired.

A. Those sales aggregated $26,300.00. I paid the Mutual Benefit $12,000.00, the bank $3,140.00 in cash, and it received purchase money notes secured by first mortgage for ninety-two hundred, making $24,340.00. The difference was $1,960.00, which Dr. Woods willingly allowed me to keep and I kept it. The gain in the price at which the land was sold was just about that much over the valuation of the Mutual Benefit——

Mr. DEAN: I object to the argument of the witness.

The COURT: Go ahead.

Q. Mr. Dean asked you why you didn't ask the bank to join you in signing that addendum to the contract May 12th before
377 you recorded it, have you any further explanation as to that?

A. Only this, that the bank had recorded the deed and the agreement was a part of the deed, part of the transaction, and the qualifications of the deed and if they were going to record a part of it they ought to record the whole of it, and when I found they had recorded only a part of the transaction I thought it was time to record the other part.

Q. Judge Robinson in answer to a question said you had never said anything to him about claiming the ownership of the land since you made those contracts, I will ask you if you ever had any talk with him about the matter since that time, I mean up there?

A. I cannot recall that I ever had a word with him on this subject. Of course when that lease was made afterwards I met him and delivered the papers to him, but I am sure there was never any discussion whatever on the part of Judge Robinson, he was simply a lawyer attending to the matter.

Q. Did you ever have any occasion to go on and tell Judge Robinson that you understood that transaction as being a mortgage?

A. Did not.

Q. Mr. Holden, there seems not to have been any credits on the Mutual Benefit note after the bank acquired it, but I find here, Exhibit C-91, the Patton note upon which there appears to be some credits, I will get you to look at this note and also your copy of the collateral account of H. M. Holden and see if you can tell
378 what items of the collateral account refer to the credits on the Patton note? *Q.* Will you first turn to that note and find credits, interest paid to and including August 31st, 1905, charged Holden collateral account, can you find it in your collateral?

A. Yes, that endorsement on the Patton note is in connection with a charge in the collateral account August 26th, note, Holden L. & S. Co. $2,875.23, interest from the date of the note, January 13, 1905, to August 31, 1905.

Q. At what rate of interest is that calculated, did you make a calculation of it?

A. I believe so, but I haven't got that rate here.

Q. Now the second credit on the note with interest from August 31, 1905, to January 31, 1906, see if you can find that?

A. The opposite entry to that is on the collateral account February 8th; here is an entry charged to collateral account held in cashier's check by Mr. Rubey, $34,996.95. I found on investigation that that amount covered——

Mr. DEAN: I object to this testimony as incompetent, irrelevant and immaterial.

The COURT: It may throw some light on Mr. Rubey's testimony.

To which ruling the defendants at the time duly excepted and still except.

A. (Continuing:) It covers $8,496.75 interest on the Inter-State note, $24,000 on the principal of that note and the balance—and $2,500.20 interest on the Patton note from August 31, 1905, to January 31, 1906.

379 Q. Credit October 16, 1906, just explain that, that credit is interest to and including October 31, 1906?

A. The interest was to January 31, 1906, the next one, the next entry is the Patton note, is interest paid to and including July 31, 1906, the opposite entry to that in the collateral account is the 3rd of July, 1906, it is interest on John Patton note $3,016.91, the next entry on the Patton note says, interest paid to and including October 31, 1906, the opposite entry to that in the collateral account is on the 16th of October a charge which says, interest on $75,005.97, $1,533.45; the next endorsement on the Patton note is as follows, interest paid to and including January 31, 1907, and the opposite entry to that is a charge on the collateral account February 1st, 1907, the number of the note, 176,230, that is the number of the note, $958.39; the next entry on the Patton note is, interest paid to and including July 31, 1907, the opposite entry to that in the collateral account is included in a charge May 4th, no explanation but the amount is $25,201.12. That embraces $21,000.00 credit on the principal of the Inter-State note, $1,184.22, interest on the Inter-State note and $3,016.90 interest on the Patton note for that time, January 31st, 1907, to July 31st, 1907. The last entry on the Patton note is interest paid to and including November 30th, 1907; the collateral account shows a charge of that date, not of August 27th, a charge of $2,548.61, which also includes some interest on the Inter-State note, I can ascertain at my room at the hotel a more perfect statement as to that. Just what that is—$2,033.50 is
380 the total of all the entries, credit on the Patton note for interest is $15,934.58. Where the entries are bunched up with some other credits I got these figures from the bank book.

Mr. DEAN: I object to this testimony as incompetent, irrelevant and immaterial.

The COURT: Overruled.

To which ruling the defendants at the time duly excepted and still except.

Q. Now Mr. Holden, can you tell how much you have paid to

the National Bank of Commerce since this $80,000.00 note was given outside of payments made strictly as interest?

Mr. DEAN: I object to the question as calling for incompetent, irrelevant and immaterial testimony, this has all been covered by the direct examination of the witness.

The COURT: You mean the total amount?

Mr. GARNETT: Yes.

The COURT: He can state that.

To which ruling the defendants at the time duly excepted and still except.

A. Including the interest that was retained by the bank at the start of $6,897.78, I have paid to the bank $135,309.31 and to the Terrace City Company since it got interested in the property, $31,310.07, making a total of $166,619.38.

Q. Does that include the seventeen thousand paid to the Mutual Benefit on the principal of its debt?

A. It does not.

381 Q. Does it include any interest paid them?

A. It does not.

Q. Judge Robinson said something in his testimony about you going to Omar Robinson and Mr. Winants instead of coming to him to see about some of these matters, I will ask you how you come to go to Mr. Omar Robinson in closing these sales?

A. I was directed to do so by Mr. Rubey to a certainty and I think also by Dr. Woods.

Q. Had you talked to them about these sales before you came to close them?

A. I did so in a general way because they were entitled to know.

Q. Did you discuss with them the terms of these sales?

A. When there was any question about the terms being entirely proper I would go to them and ascertain whether it would be acceptable; if a man only wished to pay an unusually small proportion in cash like the Cerneys, only wanted to pay one-fifth in cash and the rest within six years, didn't commend itself to me as satisfactory and I saw Dr. Woods about it (Rec. 985-996).

Q. Mr. Holden, you remember of being cross examined by Mr. Dean with regard to the assignment of these insurance policies on buildings on this Shawnee County land, I will ask you if since then you have looked this matter up and have any further explanation to make about your answer to the question there?

A. I have to some extent. The question you asked me
382 when I stated there had been no assignment of the insurance, was with respect to the transfer of ownership. The question itself ends with the words "as owner," if I remember right you had been pursuing a line of inquiry that held my mind entirely on that point, the transfer of the insurance following the ownership, and I stated that there had been no such assignment. I saw something, I don't recall now just what it was, that, I think a letter of Mr. Betzer, I think it was which showed that——

Mr. DEAN: I object to his stating what the letter shows.

The COURT: The letter will speak for itself.

A. (Continuing:) I am not sure it was that even, but anyway I got on to the fact that he had discovered by report of transfers here that a deed had been made by the Holden Company to the Inter-State Trading Company, and he tells me that——

Mr. DEAN: I object to what Mr. Betzer tells you.

The COURT: I understand the witness states he learned some way that this knowledge had come to Mr. Betzer, is that right?

A. Came to Mr. Betzer.

The COURT: Go ahead.

To which ruling the defendants at the time duly excepted and still except.

A. And he ascertained it the way that I suppose I should leave to him to tell that the deed came from the Bank of Commerce through the recorder here for registration, for record, and he then wrote Mr. Patton after conferring with the Insurance Com-
383 pany here, the Shawnee Fire Insurance Company concerning it and got the blank in the interest of the Mutual Benefit that then held the mortgage and sent the blanks down after getting the necessary consent or whatever it was, from the Shawnee Company, sent those blanks that were introduced here to Mr. Patton with request that he get me to sign the insurance over to the Inter-State Company so that the interest of the Insurance Company could be protected. The bank had nothing to do with that as an originator of it, it was entirely Mr. Betzer and for the protection of the Mutual Benefit Life Insurance Company.

Q. I was going to ask you if at the time you testified you remembered anything about those facts?

A. I did not.

Q. Do you recall now whether you signed those assignments?

A. Well, I can't say I do, I don't know that I do recall it distinctly.

Q. In other words you had no independent recollection of it at the time?

A. I didn't, and I was led by the form of your inquiry and previous inquiries at that time to think only of the state of ownership, that I knew had never been done.

Mr. DEAN: I object to what he knew and move the answer be stricken out.

The COURT: Sustained as to that part of the answer.

To which ruling the plaintiffs at the time duly excepted and still except (Rec. 1000-1002).

384 Cross-examination by Mr. DEAN:

Q. Did you deliver the deed in pursuance of that May 12th agreement without any modification?

A. The only modifications of that agreement on that date was the filling in of that note, written in in the agreement as it shows here and the note which had been given in the forenoon of that day

we made to fit the situation as it was after that note was given, then I took the deed from the bank at the time when the note was given and left with Mr. Patton to have the seal put on at my office and have my son, my youngest son who was secretary, attest it.

Q. The agreement was executed in the afternoon?

A. Yes, sir; early in the afternoon, it was understood, agreed we would meet at Judge Robinson's office and exchange the papers and that we did.

Q. You say that was a complete transaction on that day?

A. Yes, sir; I emphatically do, and I know it was.

Q. And that the contract and deed together constituted the arrangement?

A. Yes, sir.

Q. That is all there was of it?

A. Well, it was, the whole proceeding was based on the whole matter grew out of the talk we had had before that and the understanding that led to the making up of those papers.

Q. Was all carried into the papers?

A. I won't say that, there was a great deal that Mr. Patton said to me that is not explained in the papers, and Dr. Woods in his testimony shows that up too.

385 Q. What did you sign the agreement of the 14th for, dated May 14th?

A. I knew nothing of that agreement until May 14th and then they came to me with that, Mr. Patton did and said they wanted it in a little different form, I was worn out with the action of the other side, I was sick at the time, I was threatened with a hold up, that is a sale of my collaterals under the power they had in those notes, I was deadly afraid they would sell them, I believe they would, Dr. Woods' letter is on file some time back, of that threatening in determined tones to do it and I felt myself entirely in their hands as you would at midnight if a man held a pistol at your head.

Q. You signed it voluntarily, did you?

A. I signed it.

Q. You signed it voluntarily, didn't you?

A. Consider that as you please, I signed it understanding that I was doing it because they wanted to get a change of form in the security, so that in case of my death, which I think they had their mind on, and in case I failed to get active in selling and liquidating that, they would have it in their hands to have it nearer to them for such purposes and be out of the way of the Kansas law.

Q. You considered the transaction closed before the agreement dated the 14th?

A. I surely did.

Q. And then when the agreement of the 14th was produced, you knew what it was, you read it didn't you?

A. Oh, I read it, but what will you do when a man has you in his power and threatens your extinction?

386 Q. And so you signed it?

A. So I signed it and you would do the same thing. (Rec. 1003-1005).

* * * * * * *

Redirect examination:

Questions by Mr. GARNETT:

Q. Mr. Holden, referring to the contract of May 14th, 1904, I will ask you if you were ever called upon to obtain an order of the board of directors of the Holden Company to sign that contract?

A. I never was.

Q. Was there ever any order obtained?

A. There never was.

Q. Referring to Exhibits A, B, C, D, E, F, G, H, I, J, and K attached to the deposition taken in Kansas City, being cashier's checks and deposit slips showing amounts paid you on commission, I will ask you if the amounts set forth in those exhibits are of the sums testified to by you in your former examination as having been received on commission?

A. They are.

Q. These are the amounts you testified having received from the bank?

A. Yes, sir.

Q. And the application of which you explained in your testimony?

A. Yes, sir; testimony I think shows what was done with the proceeds of those checks, paid to other agents.

Mr. GARNETT: The court will remember that as bearing upon an accounting in this case under the contract with the Terrace City Realty and Securities Company, it was testified that that
387 company had received $31,260.07. Here is a statement of the dates of these different payments I want to get in the record.

Q. I show this paper to Mr. Holden and ask you if that is a statement of the amounts paid the Terrace City Company since you signed that contract?

A. It is, and also accurate statement of the dates when paid.

Mr. GARNETT: I offer this statement in evidence.

The statement in question was marked Exhibit C-152 by the stenographer, and is in words and figures as follows, to-wit:

* * * * * * *

Payments to Terrace City Realty & Securities Company by H. M. Holden.

April 15th 1908, proceeds sale to E. E. Hounsom of S. E. ¼, Sec. 36-10-13	$4,484.50
May 14th, 1908, proceeds sale to Lewis Smith of Lots 6 & 7 and part of N. ½ of S. E. ¼ North of C., R. I. & P. R. R. all in Sec. 14-11-13	5,039.37
Aug. 12th, 1908 Rent money received from Kasper Heer 110 acres	250.

Nov. 11th, 1908, proceeds sale to H. C. Gittings, S. ½ S. E. ¼, Sec. 12-11-13 and N. ½ N. E. ¼ Sec. 13-11-13	15,180.
May 29th, 1909, proceeds sale to R. R. Houdek, N. W. ¼, Sec. 30-10-14	6,306.20
	$31,260.07

(Rec. 1007-1008.)

* * * * * * *

Q. Mr. Holden, there was introduced in evidence by you
388 some tax receipts for taxes paid on the Shawnee County land, I hand you this batch of checks and ask you to look at them and see whether those checks represent the amounts paid on those taxes?

A. They do.

Mr. GARNETT: I now offer these checks in evidence in connection with the tax receipts heretofore offered in evidence for the purpose of showing these taxes were paid by Mr. Holden.

The checks in question were marked Exhibit C-153 by the stenographer, and are in words and figures as follows, to-wit (Rec. 1008-1010):

Correspondence between witness and Dr. Wood referred — in cross examination of Dr. Woods offered in evidence as follows:

The letter from witness to Dr. Woods dated Feb'y 11, 1907. Reply to same dated same day. Answer of witness dated Feb'y 12, 1907, and Dr. Woods' reply dated Feb'y 13, 1907.

These letters appear on pages 307 to 311 of this abstract.

I. L. BETZER, recalled on behalf of plaintiffs, testified:

Direct examination by Mr. GARNETT:

Represented Bartlett Brothers as their correspondent with reference to the Mutual Benefit loan on Holden ranch in fall of 1904 and procured some assignments of insurance policies held by the Life Insurance Company. He had noticed the recording of a deed of the ranch property to the Inter-State Trading Company and the register of deeds had informed him that the deed had
389 been returned to that company in care of National Bank of Commerce. He reads in evidence a letter which on October 24, 1904, he wrote to James A. Patton, Manager Claim Department National Bank of Commerce, stating these facts and presuming that he knew the transaction; also stating that it would be necessary that the Holden Land and Live Stock Company should execute assignments of their insurance on the buildings to the Inter-State Company, and he prepared and enclosed assignments which he requested Mr. Patton to have executed by the Holden Company. The assignments were on the usual printed blanks and had been filled up by the agent of the Shawnee Fire Insurance Company, and were received back by witness duly signed on October 27th.

Both sides here rested.

At the conclusion of the evidence the plaintiffs requested the referee to make the following finding of facts and conclusions of law:

Finding of Facts and Conclusions of Law Asked by Plaintiffs.

* * * * * * *

390 II.

In the spring of 1901, the plaintiff, Holden Land and Live Stock Co. had title to the 5,603.44 acres of land in Shawnee County, Kansas, which was incumbered by a mortgage of about $100,000 to one Shaw of Boston. Mr. Holden was then operating the Brush
391 Creek Coal Mining Company. Including the amount advanced by the bank to finish paying for this said 110 acres of Jackson County lands, Mr. Holden owed the bank $15,000 for which it held his note, and the Brush Creek Co. owed the bank $25,000.

On June 6th, 1901, the Holden Co. executed to the Mutual Benefit Life Insurance Co., its note for $90,000 secured by first mortgage of said Shawnee Co. lands, due July 1st, 1906, with interest from date at the rate of 5% per annum. This will be referred to as the "Mutual Benefit Note."

On July 1st, 1901, the Holden Co., executed and delivered to Howard M. Holden its note for $82,000.00, due one year after date, secured by second mortgage on said Shawnee County lands, and on the same day said Holden executed his note to defendant bank for $80,000, due one year after date, with interest from maturity at the rate of 8% per annum, and, to secure same, attached thereto as collateral security said $82,000 note and mortgage on the 5603.44 acres of land in Shawnee County, Kansas, and also $69,000, of first mortgage bonds of said Brush Creek Coal Mining Co. It was provided in said note that, if in the judgment of the holder thereof said collateral depreciated in value, the note should at once become due. It also provided that in case of default in payment of the note, W. A. Rule or in case of his death, absence or refusal to act, the then acting cashier of said bank, should be authorized to sell said collateral at public or private sale, with or without notice.
392 These transactions were consummated at the same time, and the net proceeds of the Mutual Benefit note, $87,750.00 were deposited in defendant bank; and the bank also gave Holden credit for $73,102.22 as the net proceeds of his $80,000 note after taking out its charge for interest, making a total of $160,852.22 deposited in defendant bank as the net proceeds of the two loans. Out of this amount plaintiff paid off the Shaw mortgage and also paid the bank said $15,000 note of Holden which was secured by the 110 acres and the $25,000 note of the Brush Creek Co., leaving a small balance in bank.

At the time of these loans in 1901 the Shawnee County land was worth $250,000, according to the undisputed testimony.

After maturity of the $80,000 note in July, 1902, without any formal renewal thereof, Holden paid interest thereon for one month in advance, at the rate of 8% per annum to Aug. 4, 1902. On

July 21st, 1902, out of the proceeds of a sale of part of the Shawnee County lands a payment of $2,000.00 was made on said note and $3,000 on the Mutual Benefit note. Thereafter the interest was paid by Mr. Holden monthly in advance at the rate of 8% per annum on the balance of the bank's note up to January 31st, 1903.

In the spring of 1903 the Holden Land and Live Stock Co. sold 559.19 acres of said land in five separate tracts, for $26,300.00. In order to obtain a release from the Mutual Benefit mortgage it had that company make a re-appraisement of the whole tract in
393 separate parcels. These tracts sold for $1,954.55 more than the appraisement made by the agents of the Mut. Ben. Co., and increased the margin of security in that proportion. Out of the proceeds of these sales, $12,000 was paid and applied on the Mut. Ben. note, which together with the $3,000 paid on that note in 1902 reduced the principal of the Mut. Ben. note to $75,000 in the spring of 1903.

The cash balance of the proceeds of said sale, except $1,960 which it allowed plaintiff to retain, was paid over to the bank on the $80,000 note, and $9,200 of first mortgage purchase money notes were also delivered to the bank; and the bank credited interest paid to April 15th, 1903, and also credited $3,140.00 on the principal on that date. On May 27th, 1903, the bank, having collected a purchase money note of one Bond, credited the $80,000 with $933.70 and on June 3rd, 1903, having collected another purchase money note, credited said note with $1,035, the amount thereof.

On June 17th, 1903, the $80,000 note was taken up and in renewal thereof, the bank took from Mr. Holden a note for $72,891.30, due in 30 days after date with 8% interest from maturity, and, on the same day, took from Mr. Holden note for $1,586.85 due in 30 days with interest from maturity at 8% per annum, this note being for interest on the balance of the $80,000 note to June 17th, and for discount in advance for 33 days on the renewal note of $72,891.30 and on this note for $1,586.85. Payments were made by Mr. Holden of $500 on Sept. 12th, 1903, and $90 on Oct. 9th, 1903,
394–428 on the note for $1,586.85, and interest on same to Sept. 18th, 1903, and interest was paid on the note for $72,-891.30 to Aug. 20th, 1903.

The $82,000 note of the Holden Co. with other collateral, was pledged to secure these notes.

On March 8th, 1904, the bank computed the interest on these two renewal notes up to that date, and for 33 days' discount in advance on the amount so ascertained, and took from Mr. Holden his note of that date for $77,873.90, payable 30 days after date, with interest from maturity at the rate of 8% per annum.

To secure the payment of this note the following collaterals were pledged to the bank. Said $82,000 note of the Holden Co., 784 shares of stock of the Brush Creek Coal & Mining Co., of par value of $100 each, $69,000 of bonds of said Brush Creek Co., all secured by mortgage, and one note of Hartzell for $500, and three notes for $1,000 each; four notes of Jones Anderson for $400 each, and two notes of John E. James for $1,025 each, all secured by mortgages;

with full power and authority to the cashier of said bank in case of default, to sell said collateral with or without notice.

On April 7th, 1904, $515.35 was collected by the bank on the James note and endorsed as credit on the said note of $77,873.90, and on April 9th, 1904, $90.00 of interest was collected on the Hartzell notes and on April 13th, 1904, $410.50 was collected on the James note and interest and all credited as aforesaid.

* * * * * * *

429 XLV.

The defendant, the National Bank of Commerce of Kansas City, Mo., was a National Bank located in the State of Missouri, and was not allowed to charge a greater rate of interest than was allowed by the laws of Missouri. Under the laws of that state it was only allowed to charge "interest at the rate of six per cent per annum when no other rate was agreed upon, for all moneys after they became due and payable on written contracts, and on accounts after they became due and demand of payments is made," provided that "parties may agree in writing for the payment of interest not exceeding eight per cent per annum on money due or to
430 become due on any contract." It is also provided that "parties may contract in writing for the payment of interest upon interest, but the interest shall not be compounded oftener than once a year." The laws of Missouri allow no greater rate of interest to be charged than these.

Out of the $80,000.00 note dated July 1st, 1901, the defendant bank took out in advance and reserved as interest, $6,471.11, being interest calculated on $80,000.00 for one year and five days at the rate of 8 per cent per annum, and also charged the further sum of $426.67 for interest on $80,000.00 at the rate of 8 per cent per annum from June 7th, 1901, to July 1st, 1901. There was no written contract for charging 8 per cent interest from June 7th, 1901, to July 1, 1901. Mr. Holden only received from the bank on July 1st, 1901, the sum of $73,102.22 as the net proceeds of the $80,000.00 note after said interest was taken out. Mr. Holden at the same time, paid the bank out of this $73,102.22 the two notes held by the bank aggregating the sum of $40,000, the loan having been made partly for that purpose.

After maturity of the $80,000.00 note July 1st, 1902, Mr. Holden paid interest monthly in advance at the rate of 8 per cent per annum on $80,000.00 to August 4, 1902.

On July 21st, 1902, a payment of $2,000.00 was made on the note and thereafter Mr. Holden paid interest monthly in advance at the rate of 8 per cent per annum on $78,000.00 until Jan-
431 uary 31st, 1903, and thereafter, on April 15th, 1903, a payment of $3,140.00 was made on the principal of the note and the interest paid to that date. Other payments were made on the note, until June 17th, 1903, when the note was renewed and the defendant bank took from Holden his note for $72,891.30 of that date, payable 30 days after date with interest from maturity at the rate of 8 per cent per annum, which note represented the amount

of the principal claimed to be due on the balance of the $80,000.00 note; and, at the same time, the said bank took from Mr. Holden another note for $1,586.85 of that date, due 30 days after date with interest from maturity at the rate of 8 per cent per annum, which note was for interest on the $72,891.30 from April 15th to June 17th, 1903, calculated at the rate of 8 per cent per annum, and for the discount of that sum for 33 days in advance until maturity of the note, and also for interest in advance on this interest note of $1,586.85, for 33 days calculated at 8 per cent per annum until its maturity.

From the proceeds of the collection of some of its collateral, the bank credited interest paid on the larger note to August 20, 1903, and from the same source collected and credited $90.00 on the principal and interest paid to Sept. 18th, 1903, on the smaller note. The interest on both notes being calculated at the rate of 8 per cent per annum from maturity. The amount of this interest on these two notes was $522.70, and was derived by the bank from the collection of a purchase money note of $500.00 and interest
132 given by Hartzell. The $500.00 endorsed on the principal of the smaller note as paid Sept. 12th, 1903, was paid by Mr. Holden from his private funds.

Thereafter, on March 8th, 1904, defendant bank calculated interest on these two notes from the dates to which interest was paid, at the rate of 8 per cent per annum up to that date and took from Mr. Holden his note of that date for $77,873.90 payable in 30 days with interest from maturity at the rate of 8 per cent per annum.

The amount of this note also includes the discount for 33 days in advance, being interest on the sum of the two notes figured up to March 8th and interest on that sum for the 33 days the new note had to run.

XLVI.

After the defendant bank acquired title to the Mutual Benefit note and mortgage, it charged the collateral account and applied the proceeds of sales of land and payments by Mr. Holden from the crops from time to time in sundry amounts toward payment of interest on that note. The first of such payments was $2,875.23 to and including August 31, '05. This was at 6 per cent per annum.

The next was $2,500.20 for 5 months from August 31, '05 to January 31, '06, which was at 8 per cent per annum.

The next was $3,016.91 for 6 months—to July 31, '06—at 8 per cent per annum.

433–438 The next was $1,533.45 to Oct. 31, '06—92 days at 8 per cent.

The next was $958.39, to and including Jan. 31, '07—92 days at 5 per cent.

The next was $3,016.90 to and including July 31, '07—6 months at 8 per cent.

The next and last is $2,033.50 to November 30, '07—122 days at 8 per cent.

The Mutual Benefit note drew 5 per cent interest until maturity and after that it provided for ten (10) per cent. Mr. Holden had no contract or agreement with the bank as to the rate of interest to be charged on that note after it was acquired by the bank, and he did not direct or consent to the application of these sums in payment of this interest. These charges of interest and credits on the note were made without the knowledge or consent of said Holden.

* * * * * * *

439 *Findings of Fact.*

I.

Some time prior to May 1, 1901, the date not being shown by the evidence, the plaintiff, Howard M. Holden, contracted to purchase the one hundred and ten acres of land in Jackson County, Missouri, described in the second amended petition herein, and borrowed part of the money necessary to pay for the same from the defendant, The National Bank of Commerce of Kansas City, Missouri.

440 To secure the repayment of this money, by the mutual agreement of H. M. Holden and W. S. Woods, president of the bank, without any other writing to evidence the transaction, a warranty deed for this land was executed direct by the seller to W. H. Winants, the vice-president of the bank, on or about May 1st, 1901. This deed was recorded, and H. M. Holden took possession of the land as owner thereof, subject to the indebtedness secured by the deed, and to a prior lien of $4,200, created before the deed to Winants was executed.

II.

On June 6th, 1901, the plaintiff, the Holden Land and Live Stock Company, of which company the plaintiff, Howard M. Holden, was at all times herein mentioned the president and active manager, had the record title to a tract of land containing about 5,603 44-100 acres in Shawnee County, Kansas, upon which there was a mortgage of $100,000 to one Quincy A. Shaw. The plaintiff, Howard M. Holden, was then operating a corporation known as The Brush Creek Coal Mining Company. On or shortly prior to July 1st, 1901, Howard M. Holden owed The National Bank of Commerce $15,000, for which amount the bank held his note, which sum included the money loaned by the bank, secured by the deed made to W. H. Winants for the 110 acres, and at the same time The Brush Creek Coal Mining Company owed the bank $25,000.

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III.

On or about June 6th, 1901, the plaintiff company executed to The Mutual Benefit Life Insurance Company, its note for $90,000, dated June 6th, 1901, due July 1st, 1906, with interest at 5 per cent per annum until due, and interest at 10 per cent per annum after maturity, and at the same time, to secure this note, executed a first mortgage on all of the Shawnee County lands.

On or about July 1st, 1901, the plaintiff company executed to

Howard M. Holden its note of that date for $82,000, due one year after date, and to secure this note executed a second mortgage on the Shawnee County lands described in the second amended petition, which mortgage was duly recorded. At the same time the plaintiff, Holden, executed his note to the defendant bank for $80,000, dated July 1, 1901, due in one year after date, with interest from maturity until paid, at the rate of 8 per cent per annum, and to secure the same, attached thereto as collateral security, said $82,000 note and second mortgage, and also $69,000 of the first mortgage bonds of The Brush Creek Mining Company, and it was verbally agreed that W. H. Winants should continue to hold the title to the 110 acres of land in Jackson County, Mo., as further security until the indebtedness represented by the 80,000 note was paid.

A copy of this $80,000 note, with all indorsements thereon, is in full as follows:

(Here follows copy of note, Exhibit 1.)

442

IV.

Out of the proceeds of the above mentioned notes for $90,000 and $80,000, there was paid off the Quincy A. Shaw mortgage on the Shawnee County lands, the Holden note for $15,000 and The Brush Creek Mining Company note for $25,000 to the defendant bank, and the balance of such proceeds was received by the plaintiff, Howard M. Holden.

V.

After the maturity of the $80,000 note in July, 1902, without any formal renewal thereof, the plaintiff, Holden, paid interest thereon for one month in advance at the rate of eight per cent per annum, to August 4th, 1902.

On July 21st, 1902, out of the proceeds of a sale of part of the Shawnee County lands, a payment of $2,000 was made to the bank on the $80,000 note and $3,000 was paid on the $90,000 note to the Insurance Company.

Thereafter the interest on the $80,000 note was paid to the defendant bank by the plaintiff, Holden, monthly in advance at the rate of eight per cent per annum, until January 31st, 1903.

In the spring of 1903 the plaintiff company sold 559 19-100 acres of the Shawnee County lands in five separate tracts, for $26,300, and out of the proceeds of these sales, $12,000 was paid and applied on the Insurance Company note of $90,000, thereby reducing the principal of that note to $75,000.

443 The cash balance of the proceeds of said sale, except $1,960, which plaintiff retained with the consent of the bank, was paid over to the defendant bank on the $80,000 note, and $9,200 of first mortgage purchase money notes were also delivered to said bank, and it credited interest paid to April 15, 1903, and also credited $3,140 on the principal on that date.

On May 27th, 1903, said bank, having collected a purchase money note of a man by the name of Bond, credited $933.70 on the $80,000 note, and on June 3rd, 1903, having collected another

purchase money note, credited said note with $1,035, the amount thereof.

VI.

On June 17th, 1903, the $80,000 note to the bank was taken up, and, in renewal thereof the defendant bank took from the plaintiff, Holden, his note for $72,891 30-100, due in 30 days after date, with interest at 8 per cent per annum from maturity, and on the same day took from the plaintiff, Holden, his note for $1,586.85, due in 30 days, with interest from maturity at 8 per cent per annum, this last mentioned note being for the interest on the balance of the note for $80,000 to June 17th, 1903, and for discount in advance for 33 days on the renewal note of $72,891.30. On this note for $1,586.85 payments were made by the plaintiff, Holden, of $500 on Sept. 12, 1903, $90 on Oct. 9, 1903, and interest was paid on this note to Sept. 18, 1903, and the interest was paid on the note for $72,891.30 to Aug. 20, 1903.

The $82,000 note to the plaintiff company, with other collateral, was pledged to secure these notes.

444 On March 8, 1904, the defendant bank computed the interest on these two renewal notes up to that date, and on 33 days' discount in advance on the amount so ascertained, and took from the plaintiff, Holden, his note of that date for $77,873.90, payable 30 days after date, with interest from maturity at the rate of 8 per cent per annum. This note was executed by the plaintiff, Holden, and accepted by the defendant bank in settlement of all indebtedness then owing by Howard M. Holden to said bank.

A full copy of said note with all the indorsements and credits thereon is as follows:

(Here follows copy of note, Exhibit 5.)

It was also agreed verbally at that time that W. H. Winants should continue to hold as additional security for the payment of said note, the title to the 110 acres of land in Jackson County, Missouri, until the indebtedness represented by said note was paid.

On April 17th, 1904, $515.35 was collected by the bank on the James note and endorsed as a credit on said note of $77,873.90, on April 9th, 1904, $90 of interest was collected on the Hartzell notes, and on April 13th, 1904, $410.50 was collected on the James note and interest and all credited on the note of $77,873.90.

VII.

In the latter part of May and early part of June, 1903, the Kansas River Valley, in and adjoining which the Shawnee County lands hereinbefore referred to were situated, was inundated by a
445 great and unprecedented flood which overflowed and temporarily checked, and to a considerable extent depreciated the selling values of all the flooded lands, which included a large part of the lands of the plaintiff company. By this flood the plaintiffs suffered heavy losses by reason of the destruction of a large part of the crops and live stock and injury to the lands and to the permanent improvements thereon. The plaintiffs were thereby

greatly embarrassed financially and could not, and did not meet the payments of interest and taxes when due, thereafter.

VIII.

When the note for $77,873.90 became due the defendant bank demanded payment thereof of Howard M. Holden, but the same was not paid.

Prior to the maturity of this note the plaintiffs had made defualt in the payment of interest due to The Mutual Benefit Life Insurance Company on account of the mortgage indebtedness held by it on the Shawnee County lands and had also failed to pay a considerable amount of taxes legally charged against said lands, which delinquent taxes had been advanced and paid by the Insurance Company as mortgagee.

There were legal taxes and assessments then past due and unpaid upon the 110 acres in Jackson County, Missouri.

The whole amount due the Insurance Company and in default for interest and taxes on May 12, 1904, including a charge for its attorney's fees and expenses, was $6,253.30, and said company had previously placed its note and mortgage in the hands of its
446 attorneys, at Topeka, for foreclosure, and suit was about to be begun, of which facts the plaintiffs and the defendant bank were advised.

IX.

After the maturity of the note for $77,873.90, and prior to May 12, 1904, negotiations were had between the representatives of the defendant bank and the plaintiffs, concerning this indebtedness due said bank, and the plaintiffs were notified that the securities pledged as collateral would be sold under the terms of the last Holden note, then past due, if payment was not made, or the debt due the bank was not otherwise satisfactorily arranged or adjusted so that the bank could avoid the expense and delay of the Kansas foreclosure laws.

An attempt was made to agree upon a written contract to be made between W. S. Woods, the president of the bank, and the plaintiffs, to be dated May 5, 1904 (Exhibit 6), by which the Shawnee County lands would be conveyed to W. S. Woods and the other collaterals to be transferred to him by bill of sale, with permission for the plaintiffs to redeem the same by paying the whole amount due the bank on or before Nov. 5, 1904, which attempt failed, the plaintiff, Holden, objecting to the same, and Elijah Robinson, the attorney and counselor of the defendant bank, declining to approve the proposed agreement when it was submitted to him. All the negotiations leading up to the transactions of May 12, 1904, were
447 conducted solely between the plaintiff, Holden, and representatives of the defendant bank, and the plaintiffs had no knowledge of or information concerning the Inter-State Trading Company.

X.

After these negotiations had continued for some time, an agreement was reached and Elijah Robinson, as the attorney of the bank,

prepared the deed, contract, and bill of sale hereinafter set out, all dated May 12, 1904, and the plaintiff, Holden, on that day executed and delivered to The Inter-State Trading Company a bill of sale in words and figures as follows, to-wit:

(Here follows copy, Exhibit 120.)

At the same time the plaintiff company executed and delivered to the Inter-State Trading Company a deed to the Shawnee County lands, — with all indorsements and certificates thereon, is in words and figures as follows, to-wit:

(Here follows copy deed, Exhibit 11.)

At the same time the plaintiff, Holden, signed and delivered to the Inter-State Trading Company a letter dated May 10, 1904, and addressed to W. H. Winants, a copy of which letter is in words and figures as follows, to-wit:

(Here follows copy letter, Exhibit 126.)

At the time and as a part of the same transaction, the following agreement was signed and delivered by the parties thereto, to-wit:

(Here follows copy of May 12 agreement, Exhibit 8.)

448 The original of this last agreement shows that the words "and the amount of $6,253.30 this day advanced the Mutual Benefit Life Ins. Co." were inserted in said contract by interlineation. The addition to the foregoing agreement acknowledge- November 7, 1904, was written therein about November 7, 1904 by the attorney for the plaintiff, Holden, as hereinafter set forth.

A resolution was passed by the board of directors of The Holden Land and Live Stock Company, authorizing the execution of the deed above set out to The Inter-State Trading Company, which resolution was prepared by the attorney of the bank, and in the same, the name of W. S. Woods was erased and the name of The Inter-State Trading Company was inserted as the party to whom the deed should be made.

On May 12, 1904, and at the time the foregoing papers were executed, it was verbally agreed that the following contract dated May 14, 1904, should be executed, but it was not then reduced to writing for lack of time to prepare the same, but was afterwards reduced to writing and was signed and executed by all of the parties on May 14, 1904, which agreement, with all additions thereto subsequently made, is in words and figures as follows, to-wit:

(Here follows copy May 14 agreement, Exhibit 12.)

There is no evidence that the directors of The Holden Land and Live Stock Company authorized the execution of the contract dated May 14, 1904.

449 All of the foregoing papers were prepared by, or under the direction of, Elijah Robinson, the attorney of the bank, and the plaintiffs had no legal counsel concerning the same at or prior to their execution, and the plaintiff, Holden, had no negotia-

tions with The Inter-State Trading Company. In May, 1904, the plaintiff, Holden, was about 67 years of age, with considerable business experience.

The contracts dated May 12th, and May 14th, 1904, were executed in duplicate, each of the principal parties thereto at the time taking and retaining one. No sum of money, so far as the evidence shows, was paid direct to either of the plaintiffs as a consideration for the execution of any of the foregoing writings.

XI.

By the agreement of all the parties thereto and as a part of the transaction on May 12, 1904, the defendant bank, on that day, paid to The Mutual Benefit Life Insurance Company the sum of $6,253.30, due it for interest, attorney's fees and expenses, and taxes under its mortgage, and said mortgage was then reinstated and the plaintiff, Howard M. Holden, on May 12, 1904, executed to the bank his note for that amount, and hereafter held by him under the terms of the written agreement dated May 14, 1904, which note was delivered to James A. Patton, a copy of which note, there being no indorsements thereon, is in words and figures as follows, to-wit:

(Here follows copy note, Exhibit 7.)

450 XII.

On May 12, 1904, The Inter-State Trading Company executed to the defendant bank its note for $83,675.32, with interest thereon from date at the rate of eight per cent per annum, due Nov. 9, 1904, which note was deposited together with the other papers referred to in the agreement dated May 14, 1904, in escrow with James A. Patton, an agent of the bank, under the written agreement dated May 14, 1904, and said note was afterwards delivered to said bank, by James A. Patton, and otherwise, the evidence does not show that The Inter-State Trading Company paid any consideration to any person for the deed and bill of sale to it, or on account of the transactions represented by the written agreements dated May 12th and May 14th, 1904.

XIII.

Pursuant to the letter lated May 10, 1904, addressed to W. H. Winants, signed by Howard M. Holden, W. H. Winants and his wife executed to the Inter-State Trading Company a quit claim deed for the 110 acres of land in Jackson County, Missouri, which deed was dated and acknowledged on May 17, 1904, and the same was delivered by said Winants to be held by James A. Patton under the agreement dated May 14, 1904. A full copy of this deed with all certificates and indorsements thereon is in words and figures as follows, to-wit:

(Here follows copy deed, Exhibit 143.)

XIV.

451 About Feb. 1, 1906, the assistant cashier of the defendant bank, one Chas. H. Moore, voluntarily and without any request therefor, delivered to the plaintiff, Holden, his note for $77,873.90, dated March 3, 1904; also, delivered to him at the same time his note dated May 12, 1904, for $6,253.30; neither of these notes was marked or stamped paid. The evidence shows that the note for $82,000 executed by the Howard M. Holden Land and Live Stock Company to Howard M. Holden, and the mortgage securing the same on the Shawnee County lands were never tendered or returned to either of the plaintiffs.

The $82,000 collateral mortgage was not fully released by the defendant bank until on or about the 20th day of January, 1906, at which date a paper executed by the bank intending to release this mortgage was filed for record in the register of deeds office of Shawnee County, Kansas, prior to which date the said bank had executed six partial releases of certain parts of the land covered by the said mortgages at the time said tracts were sold, in which partial releases of said mortgage it was recited in substance that the $82,000 mortgage was in force and a lien on the unreleased land described therein. It does not appear from the evidence who now has possession of the above mentioned $82,000 note, nor what disposition has been made of the same.

In the latter part of November, 1904, James A. Patton offered to surrender to the plaintiff, Holden, his above mentioned two notes dated March 8, 1904, and May 12, 1904, and shortly subse-
452 quent to that time Patton again offered to deliver these notes to the plaintiff, Holden, both of which offers were declined by plaintiff, Holden. The evidence does not show what disposition was made of the Brush Creek Coal and Mining Company stocks and bonds described in the bill of sale of May 12, 1904, and in the agreement dated May 14, 1904, which were pledged to secure the payment of the Howard M. Holden note for $77,873.90, dated March 8, 1904.

XV.

In May, 1904, the property conveyed to The Inter-State Trading Company was not readily salable, the market being at a standstill at the time, and there being but little, if any, demand for such property, but the intrinsic value of the same, as shown by the evidence, was about $60,000 in excess of the whole amount of the indebtedness due from the plaintiffs to the Mutual Benefit Life Insurance Company and the defendant bank, on May 12, 1904.

XVI.

The Holden Land and Live Stock Company was organized and incorporated by the plaintiff, Howard M. Holden, under the laws of the State of Missouri, and he, at all times, owned and held practically all the stock of such company, only so much of the same being nominally held by other persons as was necessary to effect and maintain a legal organization. For all practical purposes, How-

ard M. Holden, and the Holden Land and Live Stock Company were one and the same.

453

XVII.

The Inter-State Trading Company is a corporation, organized under the laws of the State of Missouri, with a capital stock of $2,000, and was organized, conducted and operated by the defendant, The National Bank of Commerce, for its own purposes and convenience, and said bank and said company for all practical purposes, were one and the same. The bank owned all the capital stock of said corporation, except only so much thereof nominally held by other persons as was necessary to effect and maintain a legal organization. Said corporation was largely used by the bank for the purpose of holding title to real estate, the beneficial title of which was in said bank, and it was the custom of the bank to cause real estate which said bank took in settlement of debts to be conveyed to said company and to take a note or notes from said company to itself for the sum representing the cost of said real estate and thereafter to carry such notes in the assets of the bank as bills receivable. The note of The Inter-State Trading Company for the sum of $83,675.32 when delivered to the bank was thereafter carried, with the various renewals thereof, as bills receivable on the books of the bank, and this condition continued until the bank went into the hands of a receiver in December, 1907. The property described in the deed to the Inter-State Trading Company was never carried on the books of the bank as part of its assets. Under the National Banking Law the defendant bank made five reports during the years 1905, 1906 and
454 1907, to the Comptroller of Currency of the condition and the nature of its assets and in none of these reports were any of the lands in controversy reported or listed as assets of the bank.

XVIII.

It was the intention of the defendant bank at the time, that all the papers executed in connection with the transaction dated May 12, 1904, should have the legal effect that the terms of such instruments import, it being the understanding of the officers of the bank that thereby the absolute title to the land would pass to The Inter-State Trading Company for the use and benefit of the bank, subject to the provisions stated in the agreements, dated May 12, 1904, and May 14, 1904. The plaintiff, Howard M. Holden, did not believe or understand that the plaintiffs were parting with the absolute title to the property described in such contracts, but that they would have the rights of mortgagors therein, notwithstanding said transaction, and the plaintiffs, having made default on this indebtedness, executed these instruments in order to avoid a forced sale of the property under the terms of the collateral agreement included in the note dated March 8, 1904, for $77,873.90, and a foreclosure of the $90,000 mortgage. The various instruments executed in connection with, and as a part of, the transaction of May 12, 1904, dated May 12, 1904, and May 17, 1904, were, when executed, all delivered to James A. Patton,

who was at the time, the claim agent of the bank, and is the
455 same person named in the contract dated May 14, 1904. These various writings were intended to include, and did include all matters in negotiation between the parties thereto up to and including the dates when the same were made.

XIX.

After the transactions in May, 1904, the plaintiffs continued in the actual possession of the real estate in question looking after and managing it the same as they had done before until February 16, 1905. The plaintiff, Holden, with the knowledge of the defendant bank, spent considerable of his time between November, 1904, and the commencement of this suit in caring for these lands and spent a considerable sum of money, as hereinafter stated, in repairing the damages caused by the flood to the Shawnee County lands, and in providing better drainage for these lands, in defending a damage suit about such drainage and in finding purchasers for portions of said land and in closing the sales therefor, and in assisting in collecting the purchase money notes. Between May 12th and November, 1904, none of the property in question was sold, although the plaintiff, Holden, put forth efforts to sell the same in bulk, as provided by the contract, and conducted a large and extensive correspondence to that end, but was unable to find a purchaser for the whole tract, for cash, at what he considered a reasonable value of the lands, and the deeds executed in connection with the transactions of May 12, 1904, were recorded at the dates shown by the copies thereof hereinbefore set out, and the other instruments, except the
456 $82,000 collateral note and mortgage made by the plaintiff company, were delivered or tendered to the parties entitled to the same, by James A. Patton, after November 9, 1904. In the latter part of November, 1904, James A. Patton, for the bank, or The Inter-State Trading Company, requested the plaintiffs to execute a lease for the Shawnee County lands for the term ending the following spring, which request was not complied with by the plaintiffs, but subsequently, and on or about the 16th day of February, 1905, at the urgent request of said Patton, acting for the bank, the Holden Land and Live Stock Company received from the defendant bank a written lease which was executed by the bank and the Holden Company, including all of the Shawnee County, Kansas, lands described in the second amended petition of plaintiffs, the execution of which lease was duly authorized by resolution of the board of directors of the Holden Land and Live Stock Company, a copy of which lease marked Exhibit "D," and of said resolution are in words and figures as follows, to-wit:

(Here follow copies, Exhibits 99 and 124.)

XX.

On Oct. 12, 1904, the deed from the Holden Land and Live Stock Company to the Inter-State Trading Company of the Shawnee County lands, was filed for record and shortly thereafter the plaintiff,

Holden, learned of such fact and was displeased, afterwards claiming it to be a breach of the contract of May 12, 1904, and a wrong-
457 ful assertion of an absolute title by the Inter-State Company or the defendant, bank, and thereupon he took the advice of an attorney concerning said transactions, and such attorney added at the end of said contract the words appearing thereon, which addition was acknowledged by the plaintiff on Nov. 7, 1904, and upon November 9, 1904, the plaintiff, Holden, placed the contract, with such addition, upon record. The addition to said contract acknowledged November 7, 1904, appears in the copy thereof hereinbefore set out, and was placed thereon and recorded without notice to or the knowledge of either of the defendants and it appears from the evidence that they did not learn of such fact until about the time this suit was commenced.

XXI.

The rents of the year 1904 from the Shawnee County lands were all paid to and retained by the plaintiff and no demand therefor was made by the defendant bank or the Inter-State Trading Company, and upon the expiration of the several leases to the tenants on said lands for the year 1904, the plaintiffs renewed such leases in the name of the Holden Land and Live Stock Co. for the year 1905 without consultation with, or the knowledge of either of the defendants.

XXII.

After Oct. 12, 1904, the plaintiff, Holden, several times verbally and in correspondence with the officers and agents of the defendant bank, spoke of his being indebted to the bank and requested
458 a statement of the amounts that had been received by the bank, which statement was promised to be furnished him by the president of the bank, but was not, and in substance the plaintiff, Holden, claimed in these statements that the transaction of May 12, 1904, was in the nature of a mortgage, which claims of the plaintiff were neither affirmed or denied, when made.

XXIII.

In January, 1905, prior to the execution of said lease dated February 16, 1905, the plaintiff, Holden, was authorized by the defendant bank to make sales of the Shawnee County lands in separate tracts, and at the time, as the result of his previous efforts to sell the land, the said Holden had certain purchasers in view, and in the year 1905 made six sales of certain portions of the land under written contracts in the name of the Holden Land and Live Stock Company, aggregating seven hundred ninety-two (792) acres for the consideration of $36,015.75, which sales were finally completed in January, 1906. In the meantime and prior to the death of James A. Patton, which occurred some time in the spring of 1905, the defendant bank had purchased from the Mutual Benefit Life Insurance Company its mortgage, originally for $90,000, on the Kansas land, the assignment of the same having been taken in the name of James A. Patton, but

said bank was beneficial owner of such mortgage from the time of its purchase until the commencement of the suit. This mortgage provided for interest at the rate of 5 per cent per annum until due, and 10 per cent per annum after maturity.

459

XXIV.

There was paid to the bank all of the income of the Kansas lands received by plaintiffs for the year 1905 the sum of $8,300.57. The balance of the $10,000 rental named in the lease for that year has never been paid nor any request therefor made of either of the plaintiffs, and in 1906 there was paid to said bank all income received by plaintiffs from said land for that year the sum of $5,005.78. At the expiration of the time mentioned in the lease dated February 16, 1905, nothing was said or done about a renewal of this lease and the plaintiffs retained and were in possession of the unsold lands until and when this suit was commenced; the bank also received on Oct. 4, 1907, from wheat sold the sum of $472.95 and passed into the hands of a receiver in December following.

XXV.

In the sales of separate tracts of the Shawnee County lands made after January, 1905, the plaintiff, Holden, negotiated and looked after all of the same, perfected and delivered the abstracts of title, prepared the deeds of conveyance and attended to the closing up of such sales, paid nearly all of the recording fees and his own personal expenses, including railroad fare, hotel bills, etc., without charge or expense to the bank. The regular commissions were paid upon all such sales, and, by direction of the bank, were, except in one instance, paid to and receipted for by the plaintiff, Holden, and then
460 by him turned over to the agents who actually made the sale. In one instance the commission was paid direct to George M. Noble for a sale made by him. With the knowledge and consent of the bank, the plaintiff, Holden, kept out of the proceeds from one sale the sum of $400 due him from the purchaser, and on another sale the sum of $134.55 due him, and in order to complete and carry through one sale, the plaintiff, Holden, included and conveyed one acre of land belonging to himself, upon which there was no lien of any kind, and on which acre there was a valuable spring of water said acre being valued by him in connection with the tract sold, at the sum of $1,000. No separate price was placed on this acre in the sale. The same was conveyed to the purchaser of the adjoining tract and the entire proceeds of the sale paid to the defendant bank, and no part thereof reserved by plaintiff on account of this acre. The defendant bank was notified of this fact by the plaintiff, Holden, at the time, and the plaintiff never demanded, and the bank never offered, payment to him for this acre.

XXVI.

The defendant bank kept what was called the Holden collateral account for its own convenience and as a result of the relations be-

tween the Inter-State Trading Company and said bank. It was the custom of said bank in the transaction of its large discount business when obliged to take real estate from its debtors in order to provide against losses, that in such cases, after the real estate was conveyed to the bank that what was known as a collateral account
461 was kept of the transaction, a note being executed to the bank by its representative to whom the real estate was conveyed, which was usually, as in the case in question, the Inter-State Trading Company. The professed object of the bank being to not carry such assets as real estate, but as bills receivable. The real object of these transactions being to avoid the National Banking Act, which prohibited the carrying of real estate by National Banks beyond a certain time. These collateral account notes, so-called, were renewed from time to time as the same became due, and the same were reduced by the net amount derived from the sale of real estate, for which such notes were given. In these transactions an account was kept in this manner by the bank called the Holden Collateral Account, which was intended to include all amounts received and all accounts disbursed in connection with the handling and sale of the lands and property in controversy herein. This account being opened and kept by the bank as a matter of convenience and bookkeeping and for the purpose above stated, and the term, Holden Collateral Account, was used in this instance to indicate the original assets from which the property was derived, which gave rise to the debits and credits in said account.

XXVII.

At the request of the bank examiner or Comptroller of currency, the defendant bank was required to and did secure from the Inter-State Trading Company a quit claim deed to itself of the lands in controversy, which deed was executed sometime about the early spring of 1905.

462 XVIII.

The title to the 110 acres in Jackson County, Mo., described in the second amended petition, was held in the name of W. H. Winants in trust as hereinbefore stated, until May 17, 1904. There was a deed of trust on this tract placed there by the former owner, one Bayse, to secure a note of $4,200 to one Corrigan. Mr. Holden paid the interest on this debt from time to time, and there was some interest due thereon May 1, 1905, at which time Mr. Holden took his check to Mr Corrigan's representative and offered to pay the interest. He declined to take the interest and demanded that the whole debt be paid. Shortly afterwards he had the property advertised for sale under the deed of trust, and within two or three days of the day of sale, Holden notified the bank that the property was about to be sold under the deed of trust. J. W. Rubey, who then had charge of these matters for the bank, told Mr. Holden that the bank would take up the note and mortgage if he would pay the trustee's fees and costs of advertising the sale.

The bank thereafter paid the Corrigan debt and the bank advanced the sum of $57.92 to pay the trustee's fees and these costs, and charged that amount in the Holden collateral account under the date of July 12, 1905. After paying this amount Mr. Rubey, on June 28, 1905, wrote Mr. Holden, asking him to repay the amount. After receiving this letter Mr. Holden paid the bank the amount of $57.92 thus advanced.

463 The amount paid Corrigan was charged to the Holden Collateral Account, on October 16, 1906, as $5,246.94 on "Mortgage 150 acres near Leeds," the amount actually paid therefor by the bank was $4,726.94, June 3, 1905.

XXIX.

At the time the 110 acres in Jackson County, Missouri, *was* conveyed by quit claim deed to the Inter-State Trading Company under the contract of May 12, 1904, the plaintiff, Holden, was in possession of said land and collected rents thereon until 1907, at which time the bank requested him to turn the collection of the rents over to one Donnelly, which was done. The income from this property was small and not much, if any, more than sufficient to pay the taxes and caring for the property.

XXX.

The defendant bank gave but little attention to the care and repairing of the improvements on the Shawnee County lands, but left the same almost wholly to the plaintiff, Holden. Plaintiffs paid $367.46, part of the taxes for 1906, on these lands, all other taxes thereon subsequent to May 12, 1904, were paid by defendant bank.

XXXI.

The defendant bank paid the taxes on the 110 acres in Jackson County, Missouri, after the same had been delinquent several years, and the taxes paid by the bank on the Shawnee County lands were paid after the same were delinquent.

464 The plaintiff, Holden, spent considerable time and some money during the years 1905, 1906 and 1907 in repairing the buildings and constructing dams and drains on the land.

XXXII.

The balance of the rent for the year 1905 agreed to be paid provided in the lease dated February 16, 1905, was never paid nor was any rental paid for the years 1906 and 1907, except as hereinbefore stated, but the plaintiff, Holden, laid out and expended in looking after said real estate and in making and keeping in repair the improvements thereon from January 1, 1905, to the commencement of this action, about $3,500, exclusive of the amounts paid for the salary of his foreman on the land, and he also spent a considerable portion of his own time in caring for these properties, and there never has been any accounting had or claimed by the defendant bank or the Inter-State Trading Company with the plaintiffs, or either of them, concerning these expenditures and the rent account for the years 1905, 1906 and 1907.

XXXIII.

After the transaction of May 12, 1904, the Shawnee County lands were subject to a first mortgage to the Mutual Benefit Life Insurance Company to secure $75,000, which was the balance of the note of $90,000, which note and mortgage had been given by plaintiffs to that company. There is no evidence that this debt was assumed by the Inter-State Trading Company or by the defend-
465 ant bank. At the time this suit was brought this note and mortgage were owned by the defendant bank, and so far as the evidence shows, the plaintiffs remained personally liable for the payment of the same.

XXXIV.

"Pending this suit and with full notice thereof, The Terrace City Realty and Securities Company succeeded to the rights and interest of the defendants in said cause, and entered into a stipulation with the plaintiffs which provided that:

First. Pending the litigation of the interests involved in said cause, if any portion of the real estate described in the petition therein and involved in said litigation should be sold to a purchaser or purchasers at such price or prices and on such terms as may be agreed upon by and between the parties hereto, then, in the event of any such sale or sales, the parties hereto agree to cause to be made such conveyance or conveyances as may be required and necessary to vest title in such purchaser or purchasers.

Second. Until further agreement by and between the parties hereto, the net proceeds of any such sale or sales shall be paid over to the party of the second part, to be accounted for by it on the final determination of said cause as of the date of such payment. That is to say, if it should be determined that the plaintiffs or either of them shall have the right to redeem said property, and an accounting should be had to determine the amount due by plaintiffs, then
466 the plaintiffs shall be entitled to a credit of the amounts of the proceeds of such sale on whatever amount the court shall ascertain to be due, to be applied on such amount as of the date of such payment or payments of purchase money from such sale or sales."

XXXV.

Prior to the commencement of this suit and since May 12, 1904, the defendant bank has received the following sums of money on the dates stated as follows:

1905.

June 9th	$743.00
July 1st	150.00
July 15th	3,238.50
July 31st	120.00
August 27th	2,040.00
December 21st	380.92

1906.

January 2nd	300.00
January 10th	1,925.00

January 10th	1,925.00
January 10th	4,265.00
January 10th	6,751.25
January 10th	13,201.63
January 10th	6,507.50
January 31st	493.65
February 2nd	708.79
February 12th	464.57
February 16th	456.98
February 19th	557.52
February 21st	484.71
February 23rd	3,579.50
February 28th	226.43
March 5th	187.00
March 5th	4,655.09
March 17th	700.00
March 20th	700.00
467	
March 21st	14,990.00
March 26th	300.00
March 31st	300.00
May	3.00
June 11th	2,315.00
December 17th	200.00
December 18th	500.00
December 31st	253.93
1907.	
January 7th	405.00
January	5,690.45
February 14th	1,741.25
March 7th	3,069.65
March 7th	11,640.25
March 9th	4,265.00
March 9th	6,800.00
March 26th	1,925.00
June 4th	1,923.08
August 29th	600.00
August 29th	155.86
September 11th	794.95
September 21st	344.59
September 25th	328.37
September 26th	9.00
October 4th	472.95
December 7th, 1905	8.00
January 10th, 1907	8.00
February 10th, 1908	8.00
March 14th, 1908	10.00
1907	250.00
Total	$114,073.28

March 31st, 1906	3.00
December 7th, 1906	8.00
January 10th, 1907	8.00
May 27th, 1907	15.00
September 26th, 1907	9.00
	$114,116.28

468 and during the same time it paid out the sum of $9,725.27, $4,726.94 of which was paid on June 3rd, 1905, to discharge the lien of $4,200 on the 110 acres in Jackson County, Missouri, leaving a difference of $104,364.01, and since the commencement of this suit, under the written stipulation entered into with The Terrace City Realty and Securities Company, which succeeded to the rights and interests of the defendants in this cause, has received additional sums from sales of a portion of the Kansas lands, aggregating $31,260.07, making the total receipts from these properties since May 12, 1904, from sales, incomes, rentals, and all other sources, the sum of $135,624.08 over and above the amounts disbursed and expended by the bank. Prior to May 12, 1904, there was paid to the defendant bank, on the principal of the indebtedness of the plaintiff, Howard M. Holden, on the date stated, sums of money, as follows:

1902.

July 21st	$2,000.00

1903.

April 15th	3,140.00
May 27th	933.70
June 3rd	1,035.00
— —	522.70
September 12th	500.09
October 9th	90.00

1904.

April 7th	515.35
April 9th	90.00
April 18th	410.50
Total	$9,237.25

469 The evidence does not show what consideration, if any, has been realized from the other collaterals hypothecated with the note of March 8th, 1904, not hereinbefore accounted for, nor were any such collaterals produced in the hearing of this cause before the referee.

XXXVI.

There now remains unsold of the lands described in the Second Amended Petition the following tracts:

Lands Unsold in Shawnee County, Kansas:

East ½ of Sec. 30, T. 10, R. 14.

S. W. fractional ¼ of Sec. 30, T. 10, R. 14.

Section (frl.) of Sec. 31, T. 10, R. 14.
N. frl. ½ of Sec. 6, T. 11, R. 14.
Part North of U. P. R. R. of S. W. frl. ¼ of Sec. 6, T. 11, R. 14.
W. ½ of S. E. ¼ of Sec. 6, T. 11, R. 14.
Part North of U. P. R. R. of W. ½ of N. E. ¼ and of N. W. ¼ of Sec. 7, T. 11, R. 14.
S. ½ of S. W. ¼ of Sec. 12, T. 11, R. 13.
All North of Kansas River of Section 13 except N. ½ of N. E. ¼ thereof, Sec. 13, T. 11, R. 13.
S. W. frl. ¼ of Sec. 18, T. 11, R. 14.
Also the following land, situated in Jackson County, Missouri, being the 110 acres referred to in the pleadings in evidence:
All that part of the northeast quarter of Section 26, and all that part of the northwest quarter of Section 25, in Township 49, Range 33, lying south and east of the Big Blue River, excepting the
470 east 60 acres thereof in Section 25, which had been conveyed to one Thomas Reilly; also the following described portion of said Sections 25 and 26, to-wit: Beginning at the northeast corner of the northwest quarter of the southwest quarter of Section 25, thence south with a half quarter section line 558.3 feet; thence west 2029½ feet more or less to a point on the bank of the Big Blue River in said Section 26; thence north 8 degrees and 45 minutes west along the bank of the Big Blue River 564 feet more or less, to a point where the half section line in said Section 26 intersects the bank of the Big Blue River; thence east along the half section line of said Sections 26 and 25 to the point of beginning.

XXXVII.

The following is a full, true and correct copy of the so-called "Holden Collateral Account" as the same appears on the books of defendant bank.

(Here follows copy, Exhibit 26.)

XXXVIII.

The plaintiff, Howard M. Holden, did not at the time he executed the note dated March 8th, 1904, and the note dated May 12th, 1904, or at any other time before this suit was commenced, claim that said notes or either of them, or any prior note given by him to defendant bank, contained any usury, or that any usurious interest had been collected or demanded of him, and after the execution thereof verbally and by letters he frequently stated that he owed the amount represented thereby at the time these notes were executed.

471

XXXIX.

The balance remaining unpaid on February 13th, 1908, the date of the commencement of this suit, on the notes executed by Howard M. Holden to defendant bank, one dated March 8th, 1904, and the other dated May 12th, 1904, and the $90,000 note made to the Mutual Benefit Life Insurance Company, and the $4,200 Bayse note secured by mortgage on the 110 acres of land in Jackson County,

Missouri, if the same have not been satisfied by the transactions hereinbefore recited computing interest on same, according to the terms of said notes, would be in the aggregate $81,091.93.

The foregoing balance of $81,091.93 is ascertained by charging the plaintiffs with the following items:

June 3-05, Bayse $4,200 note	$4,726.94	Int. thereon to Feb. 13-08, at 6% per annum.....	$764.18
Jan. 13-05, Balance of the Mutual Benefit Life Insurance Company note purchased on that date by the defendant bank.	73,000.00	Int. thereon at 5% per annum, to July 1-06.....	5,353.31
July 1-06 to Feb. 13-08....	.....	Int. on same note at 10% per annum	11,801.62
April 10-04, Balance due on note dated March 8-04.	76,858.05	Int. thereon at 8% per annum to Feb. 13-08.....	23,621.04
May 12-04, Demand note...	6,253.30	Int. thereon compounded to Feb. 13-08, at 8% per annum	2,098.43

472 Other charges paid by Bank for taxes and miscellaneous expenses:

July 18-05.....	15.00	Int. thereon to Feb. 13-08, at 6% per annum.....	2.31
Aug. 25-05, Taxes paid.....	1,537.14	Int. thereon to Feb. 13-08, at 10% per annum.....	379.14
Dec. 21-05.....	77.00	Int. thereon to Feb. 13-08, at 6% per annum.....	9.89
Jan. 3-06, Taxes paid.....	1,272.19	Int. thereon to Feb. 13-08, at 10% per annum.....	268.57
Jan. 11-06.....	283.50	Int. thereon to Feb. 13-08, at 6% per annum.....	35.54
Jan. 15-06.....	4.90	Int. thereon to Feb. 13-08, at 6% per annum.....	.61
Jan. 17-06.....	2.00	Int. thereon to Feb. 13-08, at 6% per annum.....	.25
Jan. 19-06.....	2.55	Int. thereon to Feb. 13-08, at 6% per annum.....	.33
Feb. 13-06.....	1.20	Int. thereon to Feb. 13-08, at 6% per annum.....	.14
Feb. 6-06, Taxes paid.....	29.78	Int. thereon to Feb. 13-08, at 10% per annum.....	6.03
Feb. 8-07.....	45.83	Int. thereon to Feb. 13-08, at 6% per annum.....	2.80
Feb. 9-07.....	7.50	Int. thereon to Feb. 13-08, at 6% per annum.....	.45
March 18-07.....	66.03	Int. thereon to Feb. 13-08, at 6% per annum.....	3.58
May 2-07, Insurance paid..	41.25	Int. thereon to Feb. 13-08, at 10% per annum.....	3.23
May 3-07.....	5.90	Int. thereon to Feb. 13-08, at 6% per annum.....	.28
June 4-07.....	50.60	Int. thereon to Feb. 13-08, at 6% per annum.....	2.10
Jan. 28-08, Taxes paid.....	1,582.96	Int. thereon to Feb. 13-08, at 10% per annum.....	6.59
	$165,863.62		$44,360.42

Total of above interest and principal, $210,224.04.

473 From the above amount was deducted the total principal sum of $114,116.28, as appears in finding No. 35, together with interest on the several credits computed from the date thereof to Feb. 13, 1908, at the rate of 8% per annum, amounting to $15,015.83, the said credits of principal and interest aggregating $129,132.11, which amount deducted from the $210,224.04 leaves the net balance due on said four notes of $81,091.93.

Conclusions of Law.

1. The plea of usury is not available to plaintiffs in this action.
2. The plaintiffs are estopped from claiming that there was any usury charged or collected by the defendant bank.
3. By the transactions set out in the foregoing findings the absolute title to all the real estate and personal property described in the agreement of May 12, 1904, and the papers executed in connection therewith would have vested absolutely in the Inter-State Trading Company in trust for the National Bank of Commerce upon the delivery in October, 1904, of the papers placed in escrow, and all indebtedness therein mentioned of the plaintiffs to the defendant, the National Bank of Commerce, would have been fully paid and satisfied if the defendants had at all times thereafter maintained and treated the transaction as being thereby concluded.
4. By reason of their acts, conduct and silence and their course of dealing with the plaintiffs, and with said property
474 & 474*a* subsequent to October 12, 1904, the defendants waived the right, and are each thereby estopped, to assert and claim that the absolute title vested by virtue of the deeds and papers executed as a part of the transaction of May 12, 1904.
5. The plaintiffs are entitled to a decree against the defendants permitting them to redeem all the unsold property in controversy, free of all *liens* and claims of each and all of the defendants and of the Terrace City Realty & Securities Company, including the $90,000 mortgage made to the Mutual Benefit Life Insurance Company, upon the payment of the balance of $81,091.93, due as set out in finding No. 39, with interest thereon at the rate of eight per cent per annum from the date of the commencement of this action to the date of such redemption, together with one-half of all the costs of this action, less such amounts as have been realized and paid to defendants subsequent to the commencement of this suit, under and in accordance with the stipulation referred to in finding No. 34, such redemption to be made within six months from the date of such decree, otherwise the title to all said property should be decreed vested absolutely in fee simple in the Terrace City Realty & Securities Company, free and clear of all titles and claims of the plaintiffs, upon the payment of all the costs of this action by defendants.
6. The costs of this action should be taxed one-half to the plaintiffs and one-half to the defendants.

——— ———,
Referee.

* * * * * * *

475 & 476 Thereafter on the 13" day of August, 1911, and within three days from the filing of said report, the plaintiffs filed their exceptions thereto and motion to modify the same, in words and figures as follows:

(Caption omitted.)

Exceptions to Report of Referee.

Now come the plaintiffs by their attorneys in the above entitled cause and object and except to the report of the Referee herein filed and to the confirmation thereof and assign the following grounds of exceptions thereto, to-wit:

* * * * * * *

477 VI.

The referee failed and refused to find and state the facts as shown by the evidence upon which the charge of usury was based. The undisputed evidence clearly shows that the transaction with the defendant bank was tainted with usury in its inception. It shows that the defendant, the National Bank of Commerce of Kansas City, Missouri, was a national bank located in the State of
478 Missouri, and under the National Banking Laws, it was not allowed to charge a greater rate of interest than was allowed by the laws of Missouri. The evidence shows that under the laws of Missouri it was only allowed to charge "interest at the rate of 6 per cent per annum when no other rate was agreed upon for all moneys after they became due and payable on written contracts, and on accounts after they became due and demand of payment is made" provided that "parties may agree in writing for the payment of interest not exceeding eight per cent per annum on money due or to become due on any contract." The laws of Missouri also provide that "parties may contract in writing for the payment of interest upon interest, but the interest shall not be compounded oftener than once a year." The laws of Missouri allow no greater rate of interest to be charged than these.

The undisputed evidence and admissions of defendants clearly show that out of the $80,000.00 note dated July 1st, 1901, the defendant bank took out in advance and reserved as interest, $6,471.11, being interest calculated on $80,000.00 for one year and five days at the rate of 8% per annum, and also charged the further sum of $426.67 for interest on $80,000.00 at the rate of 8% per annum from June 7th, 1901, to July 1st, 1901. There was no written contract for charging 8% interest from June 7th, 1901, to July 1, 1901. Mr. Holden only received from the bank on July 1st, 1901, the sum of $73,102.22 as the net proceeds of the $80,000.00 note after said interest was taken out. Mr. Holden at the same time, paid
479 the bank out of this $73,102.22 the two notes held by the bank aggregating the sum of $40,000, the loan having been made partly for that purpose.

After maturity of the $80,000.00 note July 1st, 1902, Mr. Holden paid interest monthly in advance at the rate of 8% per annum on $80,000.00 to August 4, 1902.

On July 21st, 1902, a payment of $2,000.00 was made on the note and thereafter Mr. Holden paid interest monthly in advance at the rate of 8% per annum on $78,000.00 until January 31st, 1903, and thereafter, on April 15th, 1903, a payment of $3,140.00 was made on the principal of the note and the interest paid to that date. Other payments were made on the note until June 17th, 1903, when the note was renewed and the defendant bank took from Holden his note for $72,891.30 of that date, payable 30 days after date with interest from maturity at the rate of 8% per annum, which note represented the amount of the principal claimed to be due on the balance of the $80,000 note; and, at the same time, the said bank took from Mr. Holden another note for $1,586.85 of that date, due 30 days after date with interest from maturity at the rate of 8% per annum, which note was for interest on the $72,891.30 from April 15 to June 17th, 1903, calculated at the rate of 8% per annum, and for the discount of that sum for 33 days in advance until maturity of the note, and also, for interest in advance on this interest note of $1,586.85, for 33 days calculated at 8% per annum until its maturity.

480 From the proceeds of the collection of some of its collateral, the bank credited interest paid on the larger note to August 20, 1903, and from the same source collected and credited $90.00 on the principal and interest paid to Sept. 18th, 1903, on the smaller note. The interest on both notes being calculated at the rate of 8% per annum from maturity. The amount of this interest on these two notes was $522.70 and was derived by the bank from the collection of a purchase money note of $500.00 and interest given by Hartzell. The $500.00 endorsed on the principal of the smaller note as paid Sept. 12th, 1903, was paid by Mr. Holden from his private funds.

Thereafter on March 8th, 1904, defendant bank calculated interest on these two notes from the dates to which interest was paid, at the rate of 8% per annum up to that date and took from Mr. Holden his note of that date for $77,873.90 payable in 30 days with interest from maturity at the rate of 8% per annum.

The amount of this note also includes the discount for 33 days in advance, being interest on the sum of the two notes figured up to March 8th and interest on that sum for the 33 days the new note had to run.

From these facts it clearly appears that the original transaction with the defendant bank was tainted with usury, and that the defendant bank was guilty of charging usury by compounding the debt oftener than once in a year, and the Referee should have found this to be the fact.

481 The Referee made no finding of facts relating to the usury charge. In his conclusions of law he simply concludes that the "plea of usury is not available to the plaintiffs in this action" and "the plaintiffs are estopped from claiming that there was any usury charged or collected by the defendant bank," from which it can

clearly be inferred that the Referee found that the defendant bank was guilty of charging usury, but that fact should have been found by the Referee as requested by the plaintiffs.

VII.

The evidence clearly shows that the defendant bank was guilty of charging usury on the Mutual Benefit note.

After the defendant bank acquired title to the Mutual Benefit note and mortgage, it charged the collateral account and applied the proceeds of sale of land and of payments made by Mr. Holden from the crops from time to time in sundry amounts towards the payment of interest on that note. The first of such payments was $2,875.23, which was applied to the payment of interest on that indebtedness at the rate of 6% per annum up to and including August 31, 1905.

The next was the application of the sum of $2,500.20 in payment of interest for five months from Aug. 31, 1905, to Jan. 31, 1906, which was at the rate of 8% per annum.

The next was $3,016.91 for 6 months, to July 31, 1906, at 8% per annum

482 The next was $1,533.45 to October 31, 1906, 92 days at 8%.

The next was $958.39, to and including January 31, 1907, 92 days at 5%.

The next was $3,016.90, to and including July 31, 1907, 6 months at 8%.

The next was $2,033.50 to Nov. 30, 1907, 122 days at 8%.

The Mutual Benefit note drew interest at the rate of 5% until maturity and after that it provided for interest at the rate of ten % per annum. The evidence shows that Mr. Holden had no contract or agreement with the bank as to the rate of interest to be charged on that note after it was acquired by the bank, and that he did not direct or consent to the application of these sums to the payment of this interest and that these charges of interest were made without the knowledge and consent of plaintiffs. These facts clearly appeared from the undisputed evidence in the case and the Referee should have found these facts as requested by the plaintiffs.

VIII.

Finding No. 39 of the Referee that there was due the defendants the sum of $81,091.93 at the commencement of this suit is based upon an erroneous calculation of the interest on the notes involved in the transaction. The debt which was secured to be paid by the transaction in controversy was the last of a series of renewal notes, the original of which was tainted with usury in its inception, and under the National Banking Laws the defendant bank for-

483 feited all right to charge any interest on the original note and on any renewals thereof, and was entitled to receive and collect only the principal sum loaned the plaintiff Holden without any interest being charged thereon, and the referee erred in calculating any interest on that transaction.

The $90,000 note made to the Mutual Benefit Insurance Company was not in any way involved in the issues in this case and was not involved in the transaction in question, and the referee erred in computing the interest on that note and combining that note and interest with the obligations secured by the transaction in question and including the amount due on that note in the sum which was made the basis of the plaintiff's right to redeem.

* * * * * * *

484 XII.

The referee erred in his conclusions of law. There was no basis for the conclusion of the referee that the plea of usury is not available to the plaintiffs in this action. This conclusion violates the letter and spirit of the National Banking law under which the defendant bank was organized.

In no event can a National Bank recover in any form of action any interest whatever on any indebtedness upon which it has violated the law of its existence by charging a greater rate of interest than is allowed by the laws of the state of its domicile. And the
485–487 referee erred in his conclusions that the plaintiffs were estopped from claiming that there was any usury charged by the bank. The defendant bank after having been guilty of charging usury is not entitled to collect any interest and there was no circumstance under which its victims are estopped from claiming the rights and immunities guaranteed under the National Banking law.

* * * * * * *

488 Thereupon, on the first day of June, 1911, plaintiffs' exceptions were overruled and the court rendered judgment and decree as follows:

And now, to-wit, on this first day of June, 1911, the same being a regular judicial day of the April term of said court for this year, this cause came regularly on to be heard upon the report hereinbefore filed by the Honorable J. B. Larimer as referee, the exceptions to said report filed by the plaintiffs and the motion for judgment and decree filed by said defendants. Thereupon said cause was argued orally on behalf of the said plaintiffs by Charles Blood Smith and E. P. Garnett, attorneys for said plaintiffs, and on behalf of said defendants by Elijah Robinson and John S. Dean, attorneys for the defendants. At the conclusion of said oral arguments, the said cause was submitted to the court with the permission and order of the court thereafter to file written briefs on behalf of the plaintiffs and defendants, which said written briefs were thereafter, and within the time
489 fixed by the court, duly submitted to said court by said parties. Thereupon, the court being fully advised in the premises rendered its decision and decree in said cause, as follows:

First. The exceptions to said report filed by the said plaintiffs was overruled, to which ruling and decision of the court the plaintiffs at the time duly excepted.

Second. The motion of said defendants for a judgment and decree

in their favor was overruled, to which ruling and decision of the court the defendants at the time duly excepted.

Third. The findings of fact and conclusions of law made by the referee and included in his report herein filed, are in all respects approved and said report is confirmed and adopted by the court, to which ruling and decision of the court both the plaintiffs and defendants at the time duly excepted.

It is thereupon considered, ordered, adjudged and decreed by the court that the said plaintiffs have the right and privilege to redeem the lands described in the petition filed in this case, within six months from the date hereof, to-wit, from the first day of June, 1911, upon condition that they pay to the said defendants, or into this court, for the use and benefit of said defendants, the sum of $65,233.67 together with interest thereon at the rate of eight per cent. per annum from the date of this decree to the date of the payment of said money, and that upon the payment of said money, as
490 & 491 aforesaid, the title to all lands described in said petition and located in the State of Kansas be quieted in the name of said plaintiff, the Holden Land & Live Stock Company; and that the title to the lands described in said petition as located in the State of Missouri be quieted in the name of the plaintiff, Howard M. Holden.

It is further considered, ordered, adjudged and decreed that upon the failure of said plaintiffs to pay said money to said defendants, or into this court, within six months from the said first day of June, 1911, unless the above period of redemption be extended by the Supreme Court, the title to all of said property be vested absolutely in fee simple in the defendants and their grantees, and that the plaintiffs' right and privilege of redemption in and to said real estate, and every part thereof, be forever barred upon the payment by said defendants of all the costs in this case.

It is further considered, ordered, adjudged and decreed that in the event of the redemption of the real estate described in the petition filed herein by the plaintiffs, that said plaintiffs be required to pay one-half of all the costs in this case as a further condition of their right to redeem said real estate; and that in case of redemption by said plaintiffs, as aforesaid, the said defendants be required to pay one-half of all the costs in this case.

A. W. DANA, *Judge.*

* * * * * * *

492 *Assignment of Errors.*

I.

The court erred in overruling plaintiffs' motion for a new trial.

II.

The court erred in overruling plaintiffs' exceptions to the report of the referee, and in adopting the finding of facts and conclusions of law made by the referee without modifying the same as requested by plaintiffs in their said exceptions to the said report.

III.

The court erred in approving and adopting the report of the referee as to the amount due defendants by plaintiffs and in adjudging and decreeing that plaintiffs should pay the defendants the sum of $63,233.65 with eight per cent interest from June 1st, 1911, as a condition upon which plaintiffs might redeem the property in question, as said amount was exorbitant and excessive and not due the defendants under the undisputed evidence in the case.

IV.

The court erred in approving and adopting the accounting made by the referee in ascertaining the amount due by plaintiffs to defendants, as said accounting shows that the plaintiffs were
493 charged with many items for which they were in no manner liable in law or equity, and that plaintiffs were charged interest on items of indebtedness for which they were not liable.

V.

The court erred in approving and adopting that part of the report of the referee, wherein he found that plaintiffs had waived the right to plead usury under the National Banking Act and that the plea of usury was not available to plaintiffs in this cause, for the reason that the report of the referee and judgment and decree of the court rendered thereon, denied to the plaintiffs rights, privileges and immunities guaranteed to them under the laws of the United States relating to National Banks, Sections 5197 and 5198.

VI.

The court erred in adopting the report of the referee without modifying the same as requested by plaintiffs so far as said report failed to find and state the facts upon which plaintiffs' plea of usury was based and in failing to make a finding of facts relating to the charge of usury. The request of plaintiffs for findings Nos. XLV and XLVI should have been allowed by the referee, and these findings should have been adopted by the court as statements and finding of facts relating to the charge of usury, as there was no dispute as to these facts.

VII.

The court erred in approving the report of the referee wherein the referee charged the plaintiffs ten per cent interest on the taxes
494 paid by the defendants, as the evidence shows that the defendants at the time of the payment of these taxes, had on hand sufficient unappropriated moneys of plaintiffs with which to pay these taxes.

VIII.

The court erred in approving and adopting the report of the referee, wherein the referee included in the amount to be paid by

plaintiffs in order to redeem the property, the amount claimed to be due on the note and mortgage described as the Mutual Benefit Mortgage, as this note and mortgage was not involved in the transaction in controversy, and was not owned by the defendant bank at the time of the transaction. This mortgage is still alive and in full force in the hands of the Terrace City Realty and Securities Co., not a party to this suit, and the plaintiffs are personally liable now on this note. This mortgage only covers a portion of the lands in controversy. It was not paid and released by the bank and was in no sense merged in the transaction in question, and the court erred in commingling the amount due on this mortgage with the plaintiffs' indebtedness secured by the transaction in question and in requiring its payment as a condition of plaintiffs redeeming the lands in question. This was contrary to the pleadings and all the evidence.

IX.

The court erred in adopting the report of the referee wherein interest at the rate of ten per cent per annum was calculated on
495 and added to the Mutual Benefit note and mortgage. The defendant National Bank being located in Missouri could not charge a greater rate of interest than was allowed by the laws of Missouri, and the court had no authority to allow it a greater rate of interest. The evidence shows that this item of indebtedness was kept separate from the indebtedness secured by the transaction in question and that the bank did not charge ten per cent interest on this note, and the court erred in giving the bank a greater rate of interest than it had already charged.

It is insisted that the Mutual Benefit mortgage is not involved in this suit under the issues presented by the pleadings, only to the extent that any surplus money in the hands of defendants after paying the indebtedness for which the property was pledged, should be ascertained and directed to be applied on said mortgage.

X.

The court erred in adopting the report of the referee and in rendering its decree providing that upon failure of plaintiffs to pay the defendants or into court the sum of $65,233.67 together with eight per cent interest thereon from the date of the decree, within six months from June 1st, 1911, the title to all the property in question should vest absolutely in the defendants and their grantees, and in thus rendering a decree of strict foreclosure of the Mutual Benefit mortgage and this provision of the decree is inequitable, unjust and illegal. The undisputed evidence shows that the indebted-
496 ness secured by the transaction in question has been fully paid and that large sums of money unappropriated are in the hands of the defendants and their grantee, which should be applied on the Mutual Benefit mortgage which is alive and in full force in the hands of the Terrace City Realty and Securities Company, and the court had no power to decree a strict foreclosure of that mortgage.

XI.

The court erred in providing in the decree that the defendants and their grantees should become the absolute owners in fee simple of the 110 acres in Jackson County, Missouri, in case the plaintiff failed to pay the balance due on the Mutual Benefit mortgage within six months from the date of the decree, it not being claimed that this mortgage was in any sense a lien on the Jackson County lands.

XII.

The court erred in decreeing that plaintiffs should pay one-half of the costs of this case as an additional condition of the redeeming of the property in question.

CHAS. BLOOD SMITH AND
EDWARD P. GARNETT,
Attorneys for Appellants.

497 And also on the 2nd day of February, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Notice of appeal, together with the acknowledgment of service thereon in the case of The Holden Land & Live Stock Company et al., Appellees, vs. The Inter-State Trading Company et al, Appellants, No. 18053, which is in the words and figures as follows, to-wit:

498 In the District Court of Shawnee County, Kansas.

No. 24833.

THE HOLDEN LAND AND LIVE STOCK COMPANY and HOWARD M. HOLDEN, Plaintiffs,

vs.

THE INTER STATE TRADING COMPANY, THE NATIONAL BANK OF Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Defendants.

Notice of Appeal.

To the Holden Land and Live Stock Company and Howard M. Holden, plaintiffs above named, and to E. P. Garnett, Chas. Blood Smith, and Samuel Barnum, their attorneys of record:

You, and each of you, are hereby notified that the defendants above named, to-wit, The Inter State Trading Company, The National Bank of Commerce of Kansas City, Missouri and George T. Cutts, Receiver of said Bank, hereby appeal from the judgment and order of this court overruling the defendant's demurrer to the last amended petition upon which said case was tried in this court; and from the judgment and order of this court overruling the motion made by said defendants to strike out certain allegations from the

said last amended petition filed by the plaintiffs herein; and from the judgment and order of this court overruling the motion made by said defendants to make more definite and certain the allegations in the said last amended petition filed by the plaintiffs in this case; and hereby appeal from the judgments, orders and decrees of this court entered in this case on April 13th, 1911, June 1st, 1911, and June 17th, 1911, in so far as said judgments, orders and decrees overrule and deny the motion made by said defendants for a judgment and decree in their favor upon the findings of fact made by the Referee herein, and in so far as said judgments, orders and decrees recognize, or attempt to recognize and enforce an estoppel against said defendants, preventing them from claiming and enforcing an absolute title in themselves to the real estate described in the second amended petition filed in this case; and in so far as judgments, orders and decrees declare and hold that the said defendants are not the owners, in fee simple, of all of said real estate, and entitled to the right to enforce and maintain their said absolute and fee simple title thereto.

Dated at Topeka, Kansas, this 29th day of September, 1911.

FERRY, DORAN & DEAN AND
ELIJAH ROBINSON,
Attorneys for Defendants.

Service of the foregoing notice of appeal is hereby acknowledged this 16th day of December, 1911.

THE HOLDEN LAND AND LIVE STOCK COMPANY, AND
HOWARD M. HOLDEN,
By EDWARD D. GARNETT,
CHAS. BLOOD SMITH,
SAMUEL BARNUM,
Their Attorneys of Record.

HOLDEN LAND AND LIVE STOCK
HOLDEN LAND AND LIVE STOCK COMPANY,
By H. M. HOLDEN, *President.*
H. M. HOLDEN.

Indorsed: 18053. Holden Land & Live Stock Co. et al., Appellees v. The Inter-State Trading Co. et al., Appellants. Notice of Appeal. Filed Feb. 2nd, 1912. D. A. Valentine, Clerk Supreme Court.

499 Be it further remembered, That afterwards, to-wit, on the 3d day of February 1912, the same being one of the regular judicial days of the February Session of the January, 1912, Term of the Supreme Court of the State of Kansas, said Court being in session at its court room in the City of Topeka, the following proceeding among others was had and remains of record in words and figures as follows, to-wit:

500 In the Supreme Court of the State of Kansas.

Thursday, February 3, 1912.

No. 18053.

THE HOLDEN LAND AND LIVE STOCK COMPANY et al., Appellees,
vs.
THE INTERSTATE TRADING Co. et al., Appellant-.

Journal Entry of Consolidation.

On due consideration by the Court it is ordered that the agreement of counsel to consolidate this case with case No. 17,828 of the same title, be allowed, and that the hearing of these cases be assigned for the 3rd day of April, 1912.

501–578 And also on the 24th day of February, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the abstract of appellant, in the case of The Holden Land & Live Stock Company et al., Appellees, vs. The Inter State Trading Company et al., No. 18053, which is in words and figures as follows to-wit:

579 Be it further remembered, That afterwards, to-wit, on the 3rd day of April, 1912 the same being one of the regular judicial days of the January Term of the Supreme Court of the State of Kansas, said Court being in session at its court room in the City of Topeka, the following proceeding among others was had and remains of record in the words and figures as follows, to-wit:

580 In the Supreme Court of the State of Kansas.

Wednesday, April 3, 1912.

No. 17828.

THE HOLDEN LAND AND LIVE STOCK COMPANY et al., Appellants,
vs.
THE INTERSTATE TRADING Co. et al., Appellees.

No. 18053.

THE HOLDEN LAND AND LIVE STOCK COMPANY et al., Appellees,
vs.
THE INTERSTATE TRADING Co. et al., Appellants.

Journal Entry of Submission.

An order of consolidation having heretofore been entered, these cases come on to be heard on the notices of appeal, transcript of the

judgment and abstract of the record of the district court of Shawnee county; and also comes on to be heard the motion of the Holden Land and Live Stock Company to strike out certain portions of the abstract of the Interstate Trading Company, et al., and thereupon after oral argument by John S. Dean and Elija Robinson for the appellants, The Interstate Trading Company et al., and by Charles B. Smith for the Holden Land and Live Stock Company et al., said cause and motion are submitted on brief of counsel for both parties and taken under advisement by the court.

581 Be it further remembered, That afterwards to-wit, on the 10th day of May, 1912, the same being one of the regular judicial days of the January 1912 Term of the Supreme Court of the State of Kansas, said court being in session at its court room in the City of Topeka, the following proceeding among others was had and remains of record in words and figures as follows, to-wit:—

582 In the Supreme Court of the State of Kansas.

Friday, May 10, 1912.

No. 17828.

THE HOLDEN LAND AND LIVE STOCK COMPANY et al., Appellants,
vs.
THE INTERSTATE TRADING CO. et al., Appellees.

No. 18053.

THE HOLDEN LAND AND LIVE STOCK COMPANY et al., Appellees,
vs.
THE INTERSTATE TRADING CO. et al., Appellants.

Journal Entry of Revivor.

And now to-wit, on this 10th day of May, 1912, upon motion of the appellees in case No. 17828 and appellants in case No. 18053, and it appearing that since the argument and submission of the above entitled cause to this court for decision, Howard M. Holden, one of the parties to said suit, has died; and it further appearing that notice of this motion has been duly waived by the appellants in case No. 17828 and appellees in case No. 18053, it is by the Court, Ordered that this cause be revived in the name of and continue against Hale Holden, as executor of the last will and testament of Howard M. Holden, Mary Holden, Williard M. Holden, Bertha L. Lautenbach and Hale Holden the heirs at law of Howard M. Holden, deceased.

583 Be it further remembered, That afterwards, to-wit on the 11th day of May, 1912, the same being one of the regular judicial days of the January, 1912 Term of the Supreme Court of the State of Kansas, said Court being in session at its Court room in

the City of Topeka, the following proceeding was had and remains of record in the words and figures as follows, to-wit:

584 In the Supreme Court of the State of Kansas.

Saturday, May 11, 1912.

No. 17828.

THE HOLDEN LAND AND LIVE STOCK COMPANY et al., Appellants,
vs.
THE INTERSTATE TRADING CO. et al., etc., Appellees.

No. 18053.

THE HOLDEN LAND AND LIVE STOCK COMPANY et al., Appellees,
vs.
THE INTERSTATE TRADING CO. et al., etc., Appellants.

Journal Entry of Decision.

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be modified by requiring the lien upon the Kansas land to be enforced by sheriff's sale, subject to the statutory right of redemption, and that in other respects said judgment be affirmed. It is further ordered that the costs of this case in this court be equally divided between parties appellants and appellees, taxed at $—, and hereof let execution issue.

585 And also and on the 11th day of May 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the opinion of the Court in said cause, which is in the words and figures, as follows, to-wit:

586

No. 17828.

THE HOLDEN LAND AND LIVE STOCK COMPANY and HOWARD M. HOLDEN, Appellants,

v.

THE INTER-STATE TRADING COMPANY, THE NATIONAL BANK OF Commerce, of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Appellees.

No. 18053.

THE HOLDEN LAND AND LIVE STOCK COMPANY and HOWARD M. HOLDEN, Appellees,

v.

THE INTER-STATE TRADING COMPANY, THE NATIONAL BANK OF Commerce, of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Appellants.

Appeal from Shawnee County (First Division). Modified.

Syllabus by the Court.

MASON, *J.:*

1. An agreement by a mortgagor that he will forfeit all interest in the mortgaged property, if he fails to pay the debt secured by a fixed time, will not be enforced, although made after the execution of the mortgage.

2. Where by the agreement of the mortgagor and mortgagee the note secured, and a deed for the mortgaged property from the mortgagor to the mortgagee, are deposited in escrow, both to be delivered to the mortgagor if he pays his debt by a certain date, otherwise the note to be delivered to him and the deed to the mortgagee, the delivery of the deed in accordance with the agreement does not devest the mortgagor's title.

3. If such a deed is regarded as taking effect at the time of its deposit in escrow, the continued existence of the indebtedness thereafter characterizes it as a mortgage. If it is regarded as taking effect at the end of the designated period it is invalid as an absolute conveyance of title because it is an attempt to procure in advance a release of the equity of redemption.

587 4. When a deed has been given under such circumstances that it amounts to a mortgage, the fact that the grantor accepts and signs a lease of the property from the grantee does not preclude him from asserting his right to redeem.

5. Where a party asks a court to declare a deed to be in effect a mortgage, he may be required, as a condition to receiving such equitable relief, to forego the advantage of any statutory penalties for the exaction of usury, and submit to a charge of the principal of the debt and legal interest.

All the justices concurring.

A true copy. Attest:

____ ____,

Clerk Supreme Court.

588

17828, 18053.

The opinion of the court was delivered by Mason, J.:

On June 6, 1901, the Holden Land and Live Stock Company executed to the Mutual Benefit Life Insurance Company a mortgage for $90,000, due in five years, upon a tract of land in Shawnee county, containing about 5,603 acres, of which it was the record owner. On July 1, 1901, the Holden company executed a note to Howard M. Holden for $82,000, secured by a second mortgage on the same tract. This note and second mortgage, with other security, Holden at once transferred to the National Bank of Commerce of Kansas City, Missouri, to secure his note to that bank for $80,000, bearing the same date, due in one year, and drawing eight per cent interest, which was subsequently renewed. Holden had personally purchased a tract of land in Missouri, borrowing a part of the amount necessary for the purpose from the bank. To secure the bank the deed was made to one W. H. Winants. Afterwards it was agreed that he should hold the title as further security for Holden's note to the bank. In May, 1904, Holden caused to be executed to the Inter State Trading Company, deeds covering the tracts in Kansas and Missouri, less parts of the former that had been sold, most of the proceeds having been applied to cutting down the incumbrances. On February 13, 1908, Holden and the Holden company brought an action against the bank and the Inter State Trading Company, alleging in substance that the deeds had been given by way of security for the indebtedness owing to the bank, and asking, if this should be found to have been paid in full, a decree quieting title; otherwise, a decree declaring title to be held under the deeds as security for whatever balance should be found due. The defendants maintained that the deeds were intended as absolute conveyances, and operated as such. The court found, in accordance with the report of the referee before whom the case was tried, that the defendants were precluded, by their course of dealing with the plaintiffs, from claiming the absolute title to the land; that the plaintiffs should be allowed to redeem it by paying the defendants what they had in it, amounting at the time the action was begun to $81,091.93, this including the first mortgage, which the bank had purchased; judgment was rendered that if the plaintiffs should pay this amount (which had been reduced to $65,233.67 by sales of land made during the litigation) within six months, their title should be quieted; that if they failed to make the payment within that time they should be barred of all interest in the
589 land. The defendants appeal on the ground that the court should have denied the plaintiffs any relief whatever. The plaintiffs appeal upon two principal grounds: (1) that in the accounting they should not have been charged with interest on the note given to the bank, because by the exaction of usury all interest thereon had been forfeited; and (2) that the first mortgage should not have been enforced against them otherwise than by a foreclosure and sheriff's sale.

The plaintiffs complain of some of the findings of fact made by

the referee and approved by the court. The objections have been examined and are found not to be well taken. The findings will therefore be spoken of as the established facts. The details of the transactions will be stated no further than is thought necessary to present the questions of law that are regarded as controlling.

The flood of 1903 rendered a part of the Kansas land temporarily unproductive, and occasioned loss to Holden, who in consequence failed to keep up his payments of interest and taxes. The deeds in question were executed in connection with two written contracts entered into on May 12 and May 14, 1904. The referee found that these contracts were intended to include and did include all matters in negotiation between the parties up to the time of their execution. The defendants maintain that they show that the deeds were intended as absolute conveyances, and that oral evidence is not admissible to give them a different effect. We reach the conclusion however that the writings themselves, interpreted in the light of the situation of the parties, show that under the law the deeds did not divest the mortgagor of the right to redeem the property.

The contract of May 12 was made between the Inter State Trading Company and Holden. This company was a corporation organized, owned and operated by the bank, for its own convenience, and for practical purposes the bank and the corporation were the same. The Holden company sustained the same relation to Holden. The contract recited that Holden had caused to be conveyed to the Trading company the absolute title to the lands in question and had transferred to it various stocks, bonds and notes which were held as collateral security for the same indebtedness; that in consideration thereof the Trading company had paid Holden's note to the bank for $77,873.90, and also the sum of $6,253.30 advanced by the bank to keep down the taxes and the interest on the first mortgage; provision was then made that Holden, until November 9 following was to have the right to sell the property, as the agent of the Trading company, for not less than the sum of the amounts named, with interest, he to retain as commission anything in excess of that sum. At the time of the execution of this contract the Holden company executed the deed to the Kansas land, which was delivered to the Trading company, and Holden authorized Winants in writing to make a deed conveying the absolute title to the Missouri land to the Trading company.

590

A mortgagor may of course sell the mortgaged property to the mortgagee, although the transaction will be scrutinized closely to determine its fairness—being almost as much open to suspicion, it is said, as a purchase by a trustee from his beneficiary. Villa v. Rodriguez, 12 Wall. (79 U. S.) 323. It is also said that a conveyance of the mortgaged premises from the mortgagor to the mortgagee will be regarded as a mere change in the form of security unless it clearly and unequivocally appears that both parties intended otherwise. Ennor v. Thompson, 46 Ill. 214; Skeels v. Blanchard, — Vt. —, 81 Atl. 913, 915. It may be assumed that this contract on its face contemplated an actual sale, leaving Holden with nothing but a right to repurchase within a fixed time for a

stated price. But so far as there is any inconsistency between the two, this contract must yield to that of May 14, which was executed by the bank, the Trading company, Holden and the Holden company. The second contract recited that the bank had deposited with James A. Patton (an agent of the bank) Holden's note to the bank for $77,873.90 (with some collateral security), and a demand note for $6,253.30 which Holden had given the bank May 12 (being for the taxes and interest on the first mortgage); that the Trading company had deposited with Patton its note to the bank for $83,675.32, due November 9, 1904; that Holden had deposited with Patton a bill of sale transferring to the Trading company the bonds, stocks and notes securing Holden's note, and deeds to the Trading company for the Kansas land, executed by the Holden company, and for the Missouri land, executed by Winants; the provision was made that if Holden's notes were paid by July 9, 1904, Patton should deliver to Holden the notes, the collateral, and the deeds; if the notes were not paid by that date Patton should deliver the bill of sale and the deeds to the Trading company, deliver the Trading company's note to the bank, and surrender Holden's note to Holden. This contract was extended several times, the last extension expiring October 11, 1904, but finally delivery was made
591 as directed in the event the notes were not paid by the date fixed.

Plainly the second contract superseded the first. It recited the delivery in escrow by Holden to Patton of documents which the first contract represented him as already having delivered to the Trading company. The first contract recited that Holden's note and his obligation for $6,253.30 had been paid, while the second one showed them still to be in full force. The case must be determined by the effect of the second contract. What it in substance amounts to is this: Holden, the mortgagor, and the bank, the mortgagee, agree that Holden is to have until July 9 to pay his debt; if he fails to do so he is to relinquish all claims to the land and the bank is to become the owner. The Trading company's function is merely to provide a method for carrying the property in the guise of commercial paper if the bank should become its owner. The deposit of the instruments in escrow does not affect the character of the transaction. It is but a device to insure performance. The important question is, what rights did the law give the parties under this arrangement, rather than what did they conceive their rights to be.

It is a familiar and undisputed proposition that no force will be given to a stipulation in a mortgage (or in a deed intended as a mortgage) by which the mortgagor agrees that if he fails to make payment by a stated time the mortgagee shall become the absolute owner of the property. (27 Cyc. 1098.) It is equally well settled that no effect will be given to such an agreement made separately from the mortgage, but at the same time. (11 A. & E. Encyl. of L. 243.) This principle renders ineffectual the deposit of a deed in escrow by the mortgagor at the time he gives the mortgage, for delivery to the mortgagee if he fails to meet his obligation promptly;

otherwise the rule could be readily evaded. (Plummer v. Ilse, 41 Wash. 5, 82 Pac. 1009, and note to same in 2 L. R. A., n. s. 628.) It is often said that after the execution of a mortgage the mortgagor may release to the mortgagee his "equity of redemption"—using the term to denote his right to redeem after his default, or more properly, his actual title to the property, not referring to the statutory right to redeem after a sale on foreclosure. (11 A. & E. Encyl. of L. 243; Note, 55 Am. St. Rep. 105; 3 Pomeroy's Equity Jurisprudence, Sec. 1193, note 1, p. 2371; 2 Jones on Mortgages, Sec. 1045.) What is meant, however, as is shown by an examination of the cases cited in support of such statements, is merely that the mortgagor may at any time after the execution of the mort-
592 gage, sell to the mortgagee outright all his interest in the property, by a conveyance operating at once, and in that sense release his right to redeem. But he can not, even after the mortgage has been made, bind himself by an agreement that if he does not pay his debt by a certain time in the future he will forfeit all right to the property. The recognition of such a right in a few cases of which Bradbury v. Davenport, 120 Cal. 152, 52 Pac. 301, is an example, seems to result from a failure to note the distinction referred to. Considerations of public policy forbid the enforcement of a contract made by the borrower at the inception of his loan, that he will forfeit his interest in the property he offers as security if he fails to meet his obligation promptly; the same considerations apply with equal force where he makes a like contract upon a renewal of the loan or an extension of the time of its payment. To hold otherwise would be to deprive of the benefits of the rule those most in need of its protection. If at any time after the execution of a mortgage, the mortgagee could, by an extension of time or upon any other new consideration, obtain from the mortgagor a valid agreement that if he did not pay the debt in full by a certain date he should forfeit the entire security, then virtually the ancient common law mortgage would be still in vogue, its rigors unrelieved by any equity of redemption. The modern tendency is to extend rather than to contract the scope of equitable relief against forfeitures.

"There is no principle in equity better settled, than that every contract for the security of a debt, by the conveyance of real estate, is a mortgage; and all agreements of the parties, tending to alter, in any subsequent event, the original nature of the mortgage, and prevent the equity of redemption, is void. If the conveyance, or assignment, was a mortgage in the beginning, the right of redemption is an inseparable incident, and cannot be restrained or clogged by agreement." (Henry v. Davis, 7 Johns. Ch. 40, 42.)

"The maxim, once a mortgage always a mortgage, does not cease to be applicable on the execution of the instrument, and will, on the contrary, invalidate a subsequent agreement tending to preclude the exercise of the right of redemption." (Leading Cases in Equity, White & Tudor, p. 1980, note.)

"Once a mortgage always a mortgage, may be regarded as a maxim of the Court. Equity is jealous of all contracts betwen mort-

gagor and mortgagee, by which the equity of redemption is
593 to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud, and no undue influence brought to bear upon him for that purpose by the creditor. But it can not be done by a contemporaneous or subsequent executory contract by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract, without an abandonment by the Court of those equitable principles it has ever acted on in relieving against penalties and forfeitures." (Batty v. Snook, 5 Mich. 231, 239-240.)

"Where land is conveyed to another by a deed, absolute on its face, but to secure the payment of money, and the grantee gives the debtor a written agreement to convey the land on payment of the debt, the conveyance will be a mortgage only, and its character will not be changed by giving a new note and taking a new agreement to convey in which time is made the essence of the contract, and which provides that in case of failure to pay on the day named, "the intervention of equity" shall be forever barred;—the relation of mortgagor and mortgagee will still exist." (Tennery v. Nicholson, 87 Ill. 464, syllabus.)

A valuable article upon "The Clog on the Equity of Redemption," in 21 Harvard Law Review, 459, 466, cites Wyncoop v. Cowing, 21 Ill. 570, as holding that an executory contract for the release of the equity of redemption may be held valid if made subsequently to the mortgage. The court there decided that the original transaction was a sale and not a mortgage, and what was said as to the release of the equity of redemption was avowedly dictum. The precise point here under consideration was not discussed.

If the deeds to the Trading Company are conceived as taking effect at the time of their deposit in escrow, or at the time of their first delivery to the Trading Company, then they amounted to mortgages under the usual test—the continued existence of the indebtedness. (M'Namara v. Culver, 22 Kan. 661; 1 Jones on Mortgages, (6th ed.) Secs. 264-265; 27 Cyc. 1010.) If the parties by the plan outlined in the first contract intended to carry out an arrangement the legal effect of which would be to pass the title to the land, leaving Holden only a right for its repurchase, they are shown by the second contract not to have consummated their purpose, but to have voluntarily abandoned that course and adopted one of a radically different nature, which made the deed, which had been signed and acknowledged, but not finally delivered, in effect
594 a mortgage. The second contract distinctly recognizes the notes as subsisting obligations of Holden, and the loss of his title to the land is made to turn upon whether or not they are paid by a certain date. This feature is the more noticeable because the first contract professed to show that the indebtedness had been extinguished. It is true that the notes were to be returned to Holden at the end of the period fixed, whether they were paid or not, and in the mean time they were in the hands of a third party, so that he was well protected against the enforcement of a personal

liability upon them. But the fact remains that they were not to be returned to him until the expiration of the time named, and in the meanwhile he was not entitled to them. The existence or non-existence of an indebtednss is of importanc in determining whether a transaction is a sale or a mortgage because it interprets and gives character to the language and conduct of the parties. The practical likelihood of the debtor being called on to respond to a personal liability is not an element in the determination of the matter. It is not material to inquire what purpose of the bank was subserved by the continued existence of the notes—it is enough that they were for some reason kept alive, and Holden remained a debtor to the bank. In November, 1904, Patton offered to deliver the notes to Holden, but he refused them. In February, 1906, the assistant cashier of *of* the bank delivered them to him. The note of the Holden Company was never returned.

Two Kansas cases are cited as supporting the view that the deeds to the Trading Company passed an absolute title. They are Martin v. Allen, 67 Kan. 758, 74 Pac. 249, and Fabrique v. Mining Co. 69 Kan. 733, 77 Pac. 584. In the former Martin owned land subject to a mortgage and several other liens. He deeded it to Allen, who assumed the payment of all Allen's indebtedness, and agreed to re-convey to Allen at any time within three years, upon payment of the amount, with interest. The transaction was held to be a sale and not a mortgage, because there was no indebtedness owing from Allen to Martin at any time. Allen continued to be indebted to the mortgagee and to the holder of a judgment lien, but they were strangers to the deed. The second case cited was entirely similar in principle, although there the grantee in the deed, who assumed and paid a number of the grantor's lebts, took an assignment of a mortgage. As this had been foreclosed before the deed was made the judgment had probably been released. At all events
the case was decided upon the theory that there was nothing
595 owing from the grantor to the grantee. In the present case
Holden was not indebted to the nominal grantee, the Trading Company, but the bank was not a stranger to the transaction. It was the real party in interest—the actual beneficiary of the deed. No consideration moved from the Trading Company to Holden. It neither assumed nor paid his debts. The contract was between the bank and Holden—the mortgagee and the mortgagor. See in this connection Marshall v. Thompson, 39 Minn. 137.

On October 12, 1904, the deed to the Kansas land was recorded. Holden on learning of the fact filed for record (on November 7, 1904) his copy of the contract of May 12, to which he added an acknowledged statement that the deed, with the contract, constituted, if anything, only a mortgage upon the property. On February 16, 1905, a lease for the Kansas land for that year was executed from the bank to the Holden Company, the rental named being $10,000. Holden, who had been in continuous possession, paid to the bank the income of the property, amounting to $8,300.57. No request was ever made for any further payment on that account. Holden continued in possession until this action was begun. The lease was not formally renewed. He paid the income for 1906 to the bank—

$5,005.78. In 1907 it received from a wheat crop $472.95. It is argued that the making of the lease was a recognition by Holden of the bank's ownership of the property. We regard it only as a circumstance to be weighed with other matters in determining the attitude of the parties. (Wright v. Bates, 13 Vt. 341.) It is capable of the explanation offered by the plaintiffs that it was a method of pledging the income to the bank to apply upon the debt. That no request was made for any balance gives additional plausibility to this view. As the formal legal title was in the bank (or in the Trading Company for the bank) the execution of the lease was a natural step, conforming to that situation, although Holden still claimed to be the equitable owner. The lease was not more significant of the actual title than a deed, and he had already placed upon record his declaration of his claim that the deed constituted only a mortgage.

We agree with the referee and the trial court, that whatever may have been the legal effect of the writings entered into by the parties, their subsequent conduct was such as to preclude the defendants from denying to the plaintiffs a right to redeem the property.

596 It was worth at the time of the contracts $60,000 above the liens against it. Holden continued to negotiate sales of parts of it, incurring considerable trouble and expense. Commissions were paid by the bank to him, but he turned them over to the agents who had made the sales. With the consent of the bank he retained in two instances a part of the proceeds. In order to carry through one sale he included an unincumbered tract of his own, the bank knowingly receiving the benefit. The bank kept what it called the Holden Collateral Account in which record was made of the amounts received and disbursed in connection with the property referred to. This however was a matter of convenience and in accordance with its usual plan of carrying real estate assets. At the request of the federal banking officials a deed was made by the Trading Company to the bank in the early spring of 1905. Holden expended considerable sums in permanent improvements on the property. No accounting was had or asked by the bank concerning these expenditures or the rent account for three years. As the sales of parts of the Kansas land were made the bank executed partial releases of the mortgage given by the Holden Company to Holden, and by him transferred to the bank, the releases reciting that the mortgage was still in force. We think that, upon any theory of the effect of the contracts, the bank must be deemed to have permitted Holden to act upon the assumption that he was to have the benefit of his exertions, and was to own the property whenever the bank had received the amount of its claims, with interest and expenses. Having allowed Holden to act upon this conception of his rights the bank can not deny him the privilege of redemption.

Pending the litigation the rights of the defendants were transferred to the Terrace City Realty and Securities Company. Holden has died since the cause was submitted and it has been revived in the names of the successors in interest. The issues are not in any way affected by these changes. The trial court having concluded

that the plaintiffs had only an equitable right to redeem the property, rendered judgment accordingly. As this court concludes that the relations of the parties has at all times been in effect that of mortgagor and mortgagee, the appropriate remedy is a foreclosure and sale. In effect at least the indebtedness is now all extinguished except a part of the first mortgage, the precise situation depending upon the application of payments. There would be no purpose in attempting to apportion the remainder between the first and
597 second mortgage, and the order will be made for the sale of the property to pay the balance due.

Usury was charged and collected upon the Holden note. By the national banking act the exaction of usury destroys the interest bearing quality of a debt. The referee decided that the plaintiffs were estopped from claiming the benefit of that provision. Nothing was said about usury until the present action was begun. Whether or not an actual estoppel has arisen, it was proper under the circumstances, in view of the equitable relief sought, that the plaintiffs should be charged with the principle and legal interest.

"When the borrower appears in any capacity in a court of equity asking affirmative relief against a usurious contract to pay money such relief will, in the absence of statute providing otherwise, be granted him only upon condition of his doing equity, that is, tendering the money actually due. * * * The rule * * * applies when the relief sought is the reformation or cancellation of a deed, or mortgage, or other instrument, evidencing or securing a usurious debt, or an injunction against threatened damaging action by the creditor, or in fact, whatever be the character of the relief sought. * * * In case the usurious interest has been reserved, or paid in advance, the amount equitably due is the principal debt less the usurious excess of interest paid. In the absence of statute providing otherwise if the contract for the usurious interest is still executory the sum equitably due is the principal debt with legal interest thereon." (39 Cyc. 1010-1012.)

The plaintiffs complain of the action of the trial court in dividing the costs, but that is a discretionary matter, not ordinarily subject to review (Civil Code, Sec. 615), and there is nothing in the present case to suggest an abuse of discretion.

The judgment will be modified by requiring the lien upon the Kansas land to be enforced by sheriff's sale, subject to the statutory right of redemption. Otherwise it is affirmed.

All the Justices concurring.

A true copy, attest.

____ ____,

Clerk Supreme Court.

598 And also and on the 29th day of May, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the appellants' Petition for a Re-hearing, which is in the words and figures as follows to-wit:

599 In the Supreme Court of Kansas.

Number 17828.

HOLDEN LAND AND LIVE STOCK COMPANY et al., Appellants,
vs.
THE INTERSTATE TRADING COMPANY et al., Appellees.

Petition and Motion for Rehearing and for Further Modifying Decree.

Now come appellants in the above entitled cause and show to the Court that the decision of this Court by which the decree was modified and affirmed, should provide for a further modification of the decree of the trial Court herein, and appellants petition and move the Court for a rehearing and for further modification of said decree as follows, and for the following reasons to-wit:

I.

The amount due on the indebtedness as found by the referee and Court was excessive and exorbitant and the decree should be further modified so as to eliminate these over charges. They consist in manifest errors in the referee's accounting and in exorbitant rate of interest on taxes paid, as will fully appear by reference to appellants' brief herein, page 50 et seq. It will be seen that an item of Two Hundred Seventeen and 59/100 Dollars originates from a double charges as is manifest. And there was no justification or excuse for charging 10% interest on taxes paid by the bank as is abundantly shown in our brief. We respectfully ask that the decree be further modified and that these overcharges, amounting to Four Hundred Eighty-three and 1/100 dollars, be deducted from the amount found due on the indebtedness.

600 II.

We contend and still insist that the Mutual Benefit mortgage was not involved in this controversy, and that the owners of that mortgage were not in Court asking its foreclosure. See appellants' brief 10 et seq. We now urge that the referee was wrong in allowing interest on that mortgage at the rate of 10%. (*a*) It was owned by a National Bank located in Missouri, and in no event could it collect a greater rate of interest than was allowed by the laws of its domicile, which was 6%.

(*b*) The bank never charged 10% on this mortgage as is fully shown by the records. This mortgage was represented by the Patton note (abstract 188) and the credits of interest fully appear thereon. This is made plain by the collateral account (Abs. 123 to 125) and Mr. Holden's explanation thereof (Abs. 377 to 380). Why should the court allow the bank more than it charged?

We therefore urge and insist that the decree should be further modified and that there should be deducted from the amount found to be due the further sum of Fourteen Thousand Three Hundred

Fifty-one and 77/100 Dollars, which is the difference between 10% interest on the Mutual Benefit note and 6% on the same, from July 1, 1906, to January 1st, 1911, the date of the decree, and we respectfully ask that the decree be further modified so as to deduct this additional sum from the amount found due by the court.

III.

There was included in the amount found due by the referee and court illegal and usurious interest. The defendant National Bank having charged a greater rate of interest than was allowed by the state of Missouri, where it was located, forfeited its right under the National Banking law to collect any interest on the debt in question. And there should be eliminated from the amount found due all interest calculated into the same and we respectfully ask
601 that the decree be further modified so as to exclude the amount of interest from the sum found due.

The fact that appellants were compelled to seek a court of equity to obtain an accounting which had been promised by the bank, does not relieve the bank of this forfeiture. This Court properly decided that the mortgage relation always exists, in fact until this suit was brought the bank conceded that there was a mortgage relation existing and repeatedly promised to give appellants an accounting, as was found by the referee. Having failed to redeem this promise it cannot escape the penalty of a violated law because appellants were forced to sue for an accounting. It would be taking advantage of its own wrong.

We respectfully ask this Court's attention to appellants' brief page 29 et seq. for a full discussion of this point. We again ask and insist that the decree be so modified as to eliminate from the amount found due by the referee and Court all interest calculated into the sum found due.

IV.

The decree should at least be further modified so as to conform to the decision of this Court in regard to the rate of interest which should be calculated on the debt.

This Court decides "that the plaintiffs should be charged with the principal and legal interest", but the amount found due by the referee and trial court includes both legal and usurious interest. The legal rate of interest, where the bank was located, was 6% unless there was a valid written contract for not to exceed 8%. "Legal Interest" in Missouri is 6%. See Citizens' National Bank vs. Donnell, 172 Mo. 384; S. C. 195 Mo. 564; S. C. 195 U. S. 369.

So that, in any event there should only be calculated into the debt interest at the rate of 6%. Without waiving any right to claim the forfeiture of all interest on account of the usury charges, we
602 respectfully ask that the decree be further modified so as to at least eliminate from the amount found due by the referee and Court all interest in excess of 6% on the sum of money actually loaned plaintiff.

V.

We again urge and insist that the appellants should not be taxed with any costs in this case. They were compelled to sue for an accounting which had been promised and not given. They prevailed and we know of no principal of equity which should compel them to pay costs. We refer to the authorities cited in Appellants' brief page 53 et seq.

Wherefore appellants move the Court to grant a rehearing of the matters herein set forth and that the decree herein be further modified so as to conform to the suggestions herein.

Respectfully submitted,

CHAS. BLOOD SMITH AND
EDWARD P. GARNETT,
Attorneys for Appellants.

603 [Endorsed:] No. 17828. In the Supreme Court of Kansas. Holden Land & Live Stock Co. et al. vs. The Interstate Trading Co. et al. Petition and Motion for Rehearing, and Modification of Decree. Edw. P. Garnett & Rossington & Smith, Rooms No. 23, 24, 25 and 26 Crawford Building, Topeka, Kansas, Attorneys for appellants. Filed May 29, 1912. D. A. Valentine, Clerk, Supreme Court.

604 Be it further remembered, That afterwards, to-wit, on the 14th day of June, 1912, the same being one of the regular judicial days of the January Term of the Supreme Court of the State of Kansas, said Court being in session at its court room in the City of Topeka, the following proceeding among others was had and remains of record in the words and figures as follows, to-wit:—

605 In the Supreme Court of the State of Kansas.

Friday, June 14, 1912.

No. 17,828.

THE HOLDEN LAND AND LIVE STOCK COMPANY et al., Appellants,
vs.
THE INTERSTATE TRADING CO. et al., etc., Appellees.

No. 18053.

THE HOLDEN LAND AND LIVE STOCK COMPANY et al., Appellees,
vs.
THE INTERSTATE TRADING CO. et al., etc., Appellants.

Now comes on for decision the petition- for a rehearing of this cause; and thereupon it is ordered that said petitions for a rehearing be denied.

606 Be it further remembered, That afterwards, to-wit, on the 8th day of July, 1912, the same being one of the regular

judicial days of the July, 1912 Term of the Supreme Court of the State of Kansas, said Court being in session at its court room in the City of Topeka, the following proceeding among others was had and remains of record in the words and figures as follows, to-wit:—

607 In the Supreme Court of the State of Kansas.

Monday, July 8, 1912.

No. 17,828.

THE HOLDEN LAND AND LIVE STOCK COMPANY and HOWARD M. HOLDEN, Appellants,

v.

THE INTERSTATE TRADING CO. et al., Appellees.

No. 18053.

THE HOLDEN LAND AND LIVE STOCK COMPANY et al., Appellees,

vs.

THE INTERSTATE TRADING COMPANY et al., etc., Appellants.

Substituted Order of Revivor and Judgment.

And now to-wit on this 8th day of July, 1912, it appearing that the order of revivor heretofore entered on May 10th, 1912, was inadvertently made, such order and the Judgment heretofore entered on May 11th, 1912, are hereby set aside and vacated. And it appearing that since the argument and submission of this case, Howard M. Holden, one of the parties to this suit has died; and it further appearing that all of the parties hereto consent to the entering of this order of revivor; and it further appearing that on the 31st day of May, 1912, William D. McLeod, was duly appointed administrator with the will annexed, of the estate of said Howard M. Holden, it is by the court Ordered, that this cause be revived in the name, and continued against William D. McLeod, administrator with the will annexed of the said Howard M. Holden, and Mary F. Holden, widow of the said Howard M. Holden, and Williard M. Holden, Bertha L. Lautenbach, and Hale Holden, the heirs-at-law of said Howard M. Holden deceased.

And thereupon this cause comes on for decision, and it is ordered and adjudged that the judgment of the court below be modified by requiring the lien upon the Kansas land to be enforced by sheriff's sale, subject to the statutory right of redemption, and that in other respects said judgment be affirmed. It is further ordered that the costs of this case in this court be equally divided between parties appellants and appellees, taxed at $— and hereof let execution issue.

608 STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do hereby certify that the foregoing is a true, full and com-

plete transcript of that portion of the record designated by the respective parties and the proceedings in the case of The Holden Land and Live Stock Company, et al., versus The Inter-State Trading Company, et al., also of the opinion of the court rendered therein, as the same now appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this 12th. day of September 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of the State of Kansas.

609 Here follows the original Petition for a Writ of Error and the Assignments of error, and the order granting the petition, the original Writ of error, a copy of the Bond for appeal, the original Citation and proof of service thereof, and copies of precipes of both parties as to what the transcript shall contain.

610 In the Supreme Court of the United States.

THE HOLDEN LAND AND LIVE STOCK COMPANY and WILLIAM D. McLeod, Administrator with the Will Annexed of Howard M. Holden, Deceased, and Mary F. Holden, Widow, and Willard M. Holden, Bertha L. Lautenbach, and Hale Holden, the Heirs-at-Law of Howard M. Holden, Deceased, Plaintiffs in Error,

v.

THE INTER-STATE TRADING COMPANY, THE NATIONAL BANK OF Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Defendants in Error.

The Holden Land and Live Stock Company and William D. McLeod, administrator with the will annexed of Howard M. Holden, deceased, Mary F. Holden, widow, and Willard M. Holden and Bertha L. Lautenbach and Hale Holden, heirs-at-law of Howard M. Holden, deceased, respectfully show that on the 8th day of July, 1912, the Supreme Court of the State of Kansas, rendered a judgment against your petitioners, in a certain consolidated cause, wherein the Holden Land and Live Stock Company and Howard M. Holden were appellants, and the Inter-State Trading Company, The National Bank of Commerce, of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, were appellees, being No. 17828, and wherein the Holden Land and Live Stock Company and Howard M. Holden were appellee, and The Inter-State Trading Company, The National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, were appellants, being No. 18053; that in said judgment there was presented for adjudication by said court, a federal question as to the force and meaning and effect of sections 5197 and 5198 respectively, of the revised statute- of the United States, being that part of the
611 National Banking Act of the United States, governing the limitation upon the rate of interest that may be taken by

National Banks, and the consequences of taking usurious interest by said National Banks, as set forth in and by the pleadings filed by your petitioners in said cause, and fully presented upon the record thereof, and which was decided by said Supreme Court of Kansas against the contention of your petitioners, The Holden Land and Live Stock Company and William D. McLeod, administrator with the will annexed of Howard M. Holden, deceased, and Mary F. Holden, widow, and Willard M. Holden and Bertha L. Lautenbach and Hale Holden, heirs-at-law of Howard M. Holden, deceased. A full statement of said contention as made and the errors committed by the said Supreme Court of Kansas are contained in the assignment of errors filed herewith by your petitioner.

Your petitioner therefore presents herewith an exemplified transcript of the record of the said Supreme Court of Kansas in said cause and prays that a writ of error to said Supreme Court be allowed; that said citation be granted and signed; that the bond herewith presented be approved that the same be operated as a supersedeas; that the judgment of the said Supreme Court of Kansas be reviewed in the Supreme Court of the United States and the judgment of the said Supreme Court of Kansas be so modified as to give to your petitioners the rights, privileges and immunities guaranteed to them by said sections of the revised statutes of the United States.

Assignment of Errors.

I.

The Supreme Court of the State of Kansas erred in its judgment, decision and decree, in denying your petitioners the rights, privileges and immunities guaranteed to them by sections 5197 and 5198 of the revised statutes of the United States, being a part of the National Banking Act of the United States, under which your petitioners were entitled to have all the interest charged in the transaction in question, forfeited on account of the usury charges made by the defendant, The National Bank of Com-
612 merce of Kansas City, Missouri.

II.

The Supreme Court of the State of Kansas erred in refusing to entertain the plea of usury made by your petitioners herein, and, in denying to your petitioners the right to have all of the interest carried with and agreed to be paid in the notes in question forfeited on account of the usury charges as provided by sections 5197 and 5198 of the revised statutes of the United States, being a part of the National Banking act of the United States.

III.

The Supreme Court of the State of Kansas erred in deciding that your petitioners were estopped from claiming the forfeiture of all interest on account of usury charges, as provided by said National Banking Act, for the reason that, "nothing was said about usury

until the present action was begun." The said court having decided that "usury was charged and collected upon the Holden note," and that the interest bearing quality of the debt was thereby destroyed by the provisions of the National Banking Act, erred in deciding that your petitioners were estopped from claiming the right to have all of said interest forfeited because they failed to plead said act until this action was begun.

IV.

The Supreme Court of the State of Kansas erred in adopting and approving the findings and conclusions of the referee and trial court, that your petitioners were estopped from pleading the provisions of said National Banking Act under which the interest bearing quality of the debt was destroyed by reason of the usury charges, simply because your petitioners made no claim that usury was charged until this action was begun.

V.

The Supreme Court of the State of Kansas erred because said court, after having found that the interest bearing quality
613 of the debt in question was destroyed on account of the usury charges under the National Banking Act, in deciding and adjudging that "in view of the equitable relief sought that the plaintiff should be charged with the principal and legal interest" and thus denying to your petitioners rights, privileges and immunities guaranteed to them by the laws of the United States which provisions were specially invoked by your petitioners.

VI.

The Supreme Court of the State of Kansas erred because the said court, after having decided that the interest bearing quality of the debt was destroyed by reason of the usury charges and that your petitioners should be charged only with the principal debt and legal interest, in adopting the findings and conclusions of the trial court and referee, under which your petitioners were charged not only with interest at the legal rate, but were also charged with the illegal excessive and usurious rate contrary and inconsistent with the law as declared by the said court.

VII.

The Supreme Court of the State of Kansas erred after including the first mortgage note designated in the record as the "Mutual Benefit Mortgage," in the sum found against your petitioners in holding and decreeing interest thereon at the rate of 10 per cent per annum, which was an exhorbitant and illegal rate of interest in the State of Missouri, where the said defendant, The National Bank of Commerce was located and doing business.

614 VIII.

The Supreme Court of the State of Kansas erred in calculating and charging into first mortgage note any interest. The plain and

undisputed evidence shows that after the defendant National Bank acquired the title to said first mortgage note, it charged and collected thereon interest at a greater rate than it was allowed to charge in the State of Missouri where said bank was located, whereby all the interest carried with said note and which was agreed to be paid thereon, was forfeited under the provisions of the said National Banking Act, and no interest should have been allowed charged thereon.

IX.

The Supreme Court of the State of Kansas erred in adopting the findings, conclusions and reports of the referee and trial court without modifying and correcting the manifest errors and overcharges in the accounting, by which your petitioners were charged with many items for which they were in no way liable, and, with many items of taxes alleged to be paid by the defendant bank and interest on said items at an illegal and excessive rate.

X.

The Supreme Court of the State of Kansas erred in taxing one-half of all the costs of said action against your petitioners contrary to law and equity.

Wherefore your petitioners respectfully pray that a writ of Error be allowed out of this court, directed to the Supreme Court of the State of Kansas, commanding said court to to serve and send to this court a full and complete transcript of all proceedings of said Supreme Court of the State of Kansas, in said case, wherein The Holden Land and Live Stock Company and William D. McLeod, administrator with the will annexed of Howard M. Holden, deceased, and Mary F. Holden, widow, and Willard M. Holden,
Bertha L. Lautenbach and Hale Holden, the heirs-at-law of
615 Howard M. Holden, deceased, are appellants, and The Inter-State Trading Company, The National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, are appellees, and wherein the Holden Land and Live Stock Company and Howard M. Holden are appellees, and The Inter-State Trading Company, The National Bank of Commerce, of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, are appellants, and that your petitioners may have such other and further relief and remedy in the premises as to this court may seem appropriate, and that said judgment of said Supreme Court of the State of Kansas in said cause may be so modified and reversed by this Honorable Court, as to give your petitioners the benefit of the provisions of said federal statutes specially invoked, and your petitioners will ever pray.

CHAS. BLOOD SMITH AND
E. P. GARNETT,
Attorneys for said Petitioners.

616 [Endorsed:] 17828, 18053. No. —. In the Supreme Court of the U. S. The Holden Land & Live Stock Co. et al., Pl'fs in Error, vs. The Inter-State Trading Co. et al., Def't- in Error.

Petition for Writ of Error. Rossington & Smith, Rooms No. 23, 24, 25, and 26 Crawford Building, Topeka Kansas, Attorneys for ——— ———. Filed Aug. 19, 1912. D. A. Valentine, Clerk Supreme Court.

617 No. 17828.

THE HOLDEN LAND AND LIVE STOCK COMPANY and HOWARD M. HOLDEN, Appellants,

v.

THE INTER-STATE TRADING COMPANY, THE NATIONAL BANK OF Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Appellees.

No. 18053.

THE HOLDEN LAND AND LIVE STOCK COMPANY and HOWARD M. HOLDEN, Appellees,

v.

THE INTER-STATE TRADING COMPANY, THE NATIONAL BANK OF Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Appellants.

Upon consideration of the petition of The Holden Land and Live Stock Company and William D. McLeod, administrator with the will annexed of Howard M. Holden, deceased, and Mary F. Holden, widow, and Willard M. Holden, Bertah L. Lautenbach and Hale Holden, the heirs-at-law of Howard M. Holden, deceased, the appellants in the above entitled consolidated cause, the Court does allow the writ of error prayed for therein, upon the petitioners giving a bond according to law, in the sum of Two (2,000.00) Thousand Dollars.

W. A. JOHNSTON,
Chief Justice.

618 [Endorsed:] 17828. 18053. No. —. Allowance of Writ of error & fixing Bond. Rossington & Smith, Rooms No. 23, 24, 25 and 26 Crawford Building, Topeka, Kansas, Attorneys for ——— ———. Filed Aug. 19, 1912. D. A. Valentine, Clerk Supreme Court.

619 18053. 17828.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because, in the records and proceedings as also in the rendition of the judgment of a plea which is in the Supreme Court of Kansas before you, being the highest court of law and equity in said state in which a decision could be had in said consolidated suit wherein the Holden Land and Live Stock Company and William D. McLeod,

Administrator with the will annexed of Howard M. Holden, deceased, Mary F. Holden, widow, Willard M. Holden, Bertha L. Lautenbach and Hale Holden, heirs-at-law of Howard M. Holden, deceased, were appellants, and The Interstate Trading Company, The National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, were appellees, No. 17,828, and wherein The Holden Land and Life Stock Company and William D. McLeod, Administrator with the will annexed of Howard M. Holden, deceased, Mary F. Holden, widow, Willard M. Holden, Bertha L. Lautenbach and Hale Holden, heirs-at-law of Howard M. Holden, deceased, were appellees, and The Inter-state Trading Company, The National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, were appellants, No. 18,053, wherein a right, privilege and immunity were and are claimed under the statutes of the United States, and a Federal question involved, and the decision was against the right, privilege and immunity claimed thereunder, a manifest error hath happened, to the great damage of the said The Holden Land and Live Stock Company, William D. McLeod, Administrator with the will annexed of Howard M. Holden, deceased, Mary F. Holden, widow, Willard M. Holden, Bertha L. Lautenbach and Hale Holden as by their complaint appears.

620 We being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States together with this writ so that you have the said record and proceedings aforesaid at Washington on or before the 18th day of Sept. 1912, next, in said Supreme Court to be then and there held to the end that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 19th day of August, 1912.

Issued at office in the City of Topeka with the seal of the District Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

[Seal of District Court, U. S., District of Kansas, 1861.]

MORTON ALBOUGH, *Clerk.*

Allowed this 19th day of August, 1912.

W. A. JOHNSTON,
Chief Justice.

621 [Endorsed:] 17828. 18053. Holden Land & Live Stock Co., et al., appell-, v. Inter-State Trading Co., et al. Writ of error. Filed Aug. 19, 1912. D. A. Valentine, Clerk Supreme Court.

622 In the Supreme Court of the State of Kansas.

No. 17828.

THE HOLDEN LAND AND LIVE STOCK COMPANY and HOWARD M. HOLDEN, Appellants,

v.

THE INTER-STATE TRADING COMPANY, THE NATIONAL BANK OF Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Appellees.

No. 18053.

THE HOLDEN LAND AND LIVE STOCK COMPANY and HOWARD M. HOLDEN, Appellees,

v.

THE INTER-STATE TRADING COMPANY, THE NATIONAL BANK OF Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Appellants.

Know all men by these presents, That we, The Holden Land and Live Stock Company, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, William D. McLeod, Administrator with the will annexed of Howard M. Holden, deceased, and Mary F. Holden, widow, and Willard M. Holden, Bertha L. Lautenbach and Hale Holden, the heirs-at-law of Howard M. Holden, deceased, as principals, and The American Surety Company of New York as surety, are held and firmly bound unto the Inter-State Trading Company, The National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank,
in the sum of Two Thousand $2,000.00 Dollars, to which pay-
623 ment well and truly to be made, we bind ourselves, jointly and severally, and all and each of our heirs, successors, executors and administrators firmly by these presents.

Sealed with our seals this sixth day of August, 1912.

Whereas, the above named The Holden Land and Live Stock Company, William D. McLeod, Administrator with the will annexed of Howard M. Holden, deceased, and Mary F. Holden, and Willard M. Holden, Bertha L. Lautenbach and Hale Holden, the heirs-at-law of Howard M. Holden, deceased, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment and decree of the Supreme Court of the State of Kansas rendered in the above entitled consolidated action.

Now, therefore, the condition of this obligation is such that if the above named, The Holden Land and Live Stock Company, William D. McLeod, Administrator with the will annexed of Howard M. Holden, deceased, and Mary F. Holden, the heirs-at-law of Howard M. Holden, deceased, shall prosecute their writ of error to effect, and answer all costs and damages, if they fail to make good their plea,

then this obligation shall be void; otherwise, to remain in full force and effect.

[SEAL.] THE HOLDEN LAND & LIVE STOCK COMPANY,
By HALE HOLDEN, *President.*

Attest:
R. P. ROGERS, *Sec'y.*

WILLIAM D. McLEOD,
Administrator with the Will Annexed of Howard M. Holden, Deceased.

MARY F. HOLDEN.
WILLARD M. HOLDEN.
BERTHA L. LAUTENBACH.
HALE HOLDEN.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By R. E. VALENTINE,
Resident Vice-President.

Attest:
C. E. HERSH, *Secretary.*

Aug. 19th, 1912.

The above Bond is approved.
W. A. JOHNSTON,
Chief Justice.

[Endorsed:] 17828. 18053. The Holden Land & Live Stock Co., et al., Plaintiff in error, vs. The Inter State Trading Co. et al., Defendants in error. Bond for Appeal. Filed Aug. 19, 1912. D. A. Valentine, Clerk Supreme Court.

624 18053. 17828.

THE UNITED STATES OF AMERICA:

To The Interstate Trading Company, The National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, receiver of said bank, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C. within thirty days from the date hereof pursuant to a writ of error allowed and filed in the Clerk's office of the Supreme Court of the State of Kansas wherein The Holden Land and Live Stock Company and William D. McLeod, administrator with the Will annexed of Howard M. Holden, deceased, and Mary F. Holden, widow, and Willard M. Holden, Bertha L. Lautenbach and Hale Holden, the heirs-at-law of Howard M. Holden, deceased are plaintiffs in error,

and The Interstate Trading Company, The National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error as in said writ mentioned should not be corrected and why speedy justice should not be done in that behalf.

Witness, the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, this 19th day of August, A. D. 1912.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

Attest:
D. A. VALENTINE, *Clerk.*

Service of foregoing citation is hereby accepted this 19th day of August, 1912.

FERRY, DORAN & DEAN,
Att'ys for Dft. in Error.

[Endorsed:] 17828. 18053. Holden L. & L. Stock Co. et al. v. Inter State Trading Co. et al. Citation. Issued Aug. 19th, 1912. Returnable —. Filed Aug. 19, 1912. D. A. Valentine, Clerk Supreme Court.

625 Filed Sep. 6th, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 17828.

THE HOLDEN LAND & LIVE STOCK COMPANY et al., Appellants,
vs.
THE INTERSTATE TRADING COMPANY et al., etc., Appellees.

No. 18053.

THE HOLDEN LAND & LIVE STOCK COMPANY et al., Appellees,
vs.
THE INTERSTATE TRADING COMPANY et al., etc., Appellants.

To Honorable D. A. Valentine, Clerk of the Supreme Court of the State of Kansas:

In preparing a transcript upon the writ of error allowed in this case for the Supreme Court of the United States, for the purpose of reducing the size of the transcript and eliminating all papers not necessary to the consideration of the questions to be reviewed, you are directed by the undersigned plaintiffs in error to include in said transcript the following portions of the record only:

Notice of appeal by appellants in case No. 17,828 with proof of service thereof.

Abstract of record of appellants in No. 17,828.

Order of consolidation of case No. 18,053 with case No. 17,828, dated February 3, 1912.

Journal entry of submission, dated April 3, 1912.

Order of reviver, dated May 10, 1912.

Journal entry of decision of May 11, 1912.

Opinion of the court.

626 Petition of the Holden Land & Livestock Co., et al. for a rehearing, filed May 29, 1912.

Order denying petition for a rehearing, dated June 14, 1912.

Substituted order of reviver and judgment, dated July 8, 1912.

Original petition for writ of error and Assignments of Error.

Order allowing writ of error and fixing bond.

Original writ of error.

Copy of bond.

Citation with proof of service thereof.

CHAS. BLOOD SMITH,
E. P. GARNETT,

Counsel for the Holden Land & Livestock Company and Wm. D. McLeod, Adm'r with the Will Annexed of Howard M. Holden, Deceased, and Mary F. Holden, Widow, and William M. Holden, Bertha J. Lautenbach, and Hale Holden, the Heirs at Law of Howard M. Holden, Deceased, Plaintiffs in Error.

Due service of a copy of the above præcipe is hereby acknowledged this 6th day of September, 1912.

FERRY, DORAN & DEAN,

Attorneys for the Interstate Trading Company, The National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Defendants in Error.

627 Filed Sep. 14th, 1912. D. A. Valentine, Clerk Sup. C't.

In the Supreme Court of the State of Kansas.

No. 17828.

THE HOLDEN LAND & LIVE STOCK COMPANY et al., Appellants,
vs.
THE INTERSTATE TRADING COMPANY et al., etc., Appellees.

No. 18053.

THE HOLDEN LAND & LIVE STOCK COMPANY et al., Appellees,
vs.
THE INTERSTATE TRADING COMPANY et al., etc., Appellants.

To Honorable D. A. Valentine, Clerk of the Supreme Court of the State of Kansas:

The appellants in case #17828 and the appellees in case #18053, direct that the following portion of the record be included in the transcript to be filed in the Supreme Court of the United States:

1. Notice of appeal of the Interstate Trading Company, et al., in case #18053, with proof of service thereof.
2. Abstract of appellants in case #18053.

FERRY, DORAN & DEAN,
ELIJAH ROBINSON,
Attorneys for the Interstate Trading Company, The National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Defendants in Error.

628 Due service of a copy of the foregoing præcipe is hereby acknowledged this 13th day of September, 1912.

E. P. GARNETT &
CHAS. BLOOD SMITH,
Counsel for the Holden Land & Live Stock Company, and Wm. D. McLeod, Adm'r with the Will Annexed of Howard M. Holden, Deceased, and Mary F. Holden, Widow, and William M. Holden, Bertha J. Kautenbach, and Hale Holden, the Heirs at Law of Howard M. Holden, Deceased, Plaintiffs in Error.

629 STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, clerk of said court, do hereby certify that there was lodged with me as such clerk on August 19th, 1912, in the matter of The Holden Land and Live Stock Company et al. versus The Inter-State Trading Company et al.

The Original Bond of which a copy is herein set forth.

Copies of the writ of error, as herein set forth, one for the Defendant-, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 12th day of September, 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

630 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Kansas, in the City of Topeka, this 12th day of September 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

631 In the Supreme Court of the United States.

THE HOLDEN LAND AND LIVESTOCK COMPANY and WILLIAM D. McLeod, Administrator with the Will Annexed of Howard M. Holden, Deceased, and Mary F. Holden, Widow, and Willard M. Holden, Bertha L. Lautenbach, and Hale Holden, the Heirs-at-Law of Howard M. Holden, Deceased, Plaintiffs in Error,

vs.

THE INTERSTATE TRADING COMPANY, THE NATIONAL BANK OF Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Defendants in Error.

To Honorable James H. McKenney, Clerk of the Supreme Court of the United States:

The plaintiffs in error intend to reply upon the first eight assignments of errors filed by them, and for the consideration by the Court of such assignments, they think it necessary that the following parts of the record be printed:

1. Citation with proof of service thereon.

2. The first 389 pages of the printed abstract of the record in the case of Holden Land & Livestock Company and Howard M. Holden, plaintiffs, v. The Interstate Trading Company, The National Bank of Commerce of Kansas City, Missouri, and Geo. T. Cutts, Receiver of said Bank, defendants, in the Supreme Court of the State of Kansas, No. 17,828, embodied in the transcript in this case.

3. The following findings of fact asked by said plaintiffs in said case and appearing in said printed abstract of record in said cause:

a. Finding No. 2 on page 390 of said printed abstract of the record.

632 *b*. Finding No. 45 appearing on pages 429, 430, 431 and 432 of said abstract of record.

c. Finding No. 46 appearing on pages 432 and 433 of said abstract of record.

4. Findings of fact and conclusions of law found by the Referee appearing on pages 439 to 474 inclusive in said abstract of record.

5. Exceptions 6, 7 and 8 of said plaintiff- to the report of the Referee appearing on pages 477 to 482 inclusive in said abstract of record.

6. Exception 12 of said plaintiffs to the conclusions of law of said Referee appearing on pages 484 and 485 of said abstract of record.

7. So much of the abstract of record appearing on page- 488, 489 and 490, showing that the exceptions of plaintiffs were overruled, and the judgment and decree of the trial court.

8. Notice of appeal by appellants in case No. 17,828, with proof of service thereon.

9. The assignments of errors of appellants in the Supreme Court of the State of Kansas, appearing on pages 492 to 496 inclusive of said printed abstract of record in said case No. 17,828.

10. Order of the Supreme Court of the State of Kansas for the consolidation of case No. 18,053 with case No. 17,828, dated February 3, 1912.

11. Journal entry of submission dated April 3, 1912.

12. Order of Reviver dated May 10, 1912.

13. Journal entry of decision of May 11, 1912.

14. Opinion of the Court.

15. Petition of the Holden Land & Livestock Company, et al., for a rehearing filed April 29, 1912.

16. Order denying petition for a rehearing dated June 14, 1912.

633 17. Substituted order of reviver and judgment dated July 8, 1912.

18. Petition for writ of error and assignments of error.

19. Order allowing writ of error and fixing bond.

20. Writ of error.

21. Copy of Bond.

22. Clerk's certificate to transcript.

E. P. GARNETT,
CHAS. BLOOD SMITH,
Attorneys for said Plaintiffs in Error.

Service of a copy of the foregoing statement and suggestions for printing of the record is hereby acknowledged this 20th day of December, 1912.

FERRY, DORAN & DEAN AND
ELIJAH ROBINSON,
Attorneys for said Defendants in Error.

[Endorsed:] 801/23,376.

634 [Endorsed:] File No. 23,376. Supreme Court U. S., October Term, 1912. Term No. 801. The Holden Land & Live Stock Company et al., Pl'ffs in Error, vs. The Interstate Trading Company et al. Specification of errors relied on and designation by plaintiffs in error of parts of record to be printed, and proof of service of same. Filed December 23, 1912.

Endorsed on cover: File No. 23,376. Kansas Supreme Court. Term No. 354. The Holden Land and Live Stock Company, William D. McLeod, administrator with the will annexed of Howard M. Holden, deceased, and Mary F. Holden, widow, and William M. Holden, Bertha L. Lautenbach and Hale Holden, heirs at law of Howard M. Holden, deceased, plaintiffs in error, vs. The Interstate Trading Company, The National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, receiver of said bank. Filed October 7th, 1912. File No. 23,376.

20

Office Supreme Court, U. S.
FILED
FEB 3 1914
JAMES D. MAHER
CLERK

NUMBER 354.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

The Holden Land and Live Stock Company, William D. McLeod, Administrator With the Will Annexed of Howard M. Holden, Deceased, and Mary F. Holden, Widow, and William M. Holden, Bertha L. Lautenbach, and Hale Holden, Heirs-at-law of Howard M. Holden, Deceased, Plaintiffs in Error,

vs.

The Interstate Trading Company, the National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT, BRIEF AND ARGUMENT BY PLAINTIFFS IN ERROR.

EDWARD P. GARNETT,
Solicitor and of Counsel for Plaintiffs in Error.

OLIVER H. DEAN, and
CHARLES BLOOD SMITH,
Of Counsel.

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NUMBER 354.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

The Holden Land and Live Stock Company, William D. McLeod, Administrator With the Will Annexed of Howard M. Holden, Deceased, and Mary F. Holden, Widow, and William M. Holden, Bertha L. Lautenbach, and Hale Holden, Heirs-at-law of Howard M. Holden, Deceased, Plaintiffs in Error,

vs.

The Interstate Trading Company, the National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT.

This was an action brought originally in the District Court of Shawnee County, Kansas, for the purpose of an accounting in order to ascertain what amount, if any, was due on certain notes executed by Howard M. Holden to the National Bank of Commerce of Kansas City, Mis-

souri, and to have certain deeds which were absolute on their face, and which were accompanied by certain contracts of defeasance, decreed to be mortgages, and for a release and satisfaction of said mortgages, the plaintiffs claiming that the transaction was tainted with usury in its inception, and that under the National Banking Act the National Bank of Commerce, which was located in Missouri, forfeited its right to collect any interest on the indebtedness. After a trial before a referee in said District Court, the case was appealed to the Supreme Court of Kansas, and then brought to this court on writ of error. The facts stated by the Supreme Court of Kansas in its opinion are sufficient to advise this court of the question to be reviewed by this writ of error.

We quote from the opinion, beginning at page 253 of the record, as follows:

> "On June 6, 1901, the Holden Land and Live Stock Company executed to the Mutual Benefit Life Insurance Company a mortgage for $90,000, due in five years, upon a tract of land in Shawnee County, containing about 5,603 acres, of which it was the record owner. On July 1, 1901, the Holden Company executed a note to Howard M. Holden for $82,000, secured by a second mortgage on the same tract. This note and second mortgage security, Holden at once transferred to the National Bank of Commerce of Kansas City, Missouri, to secure his note to that bank for $80,000 bearing the same date, due in one year, and drawing eight per cent interest, which was subsequently renewed. Holden had personally purchased a tract of land in Missouri,

borrowing a part of the amount necessary for the purpose from the bank. To secure the bank, the deed was made to one W. H. Winants. Afterwards it was agreed that he should hold the title as further security for Holden's note to the bank. In May, 1904, Holden caused to be executed to the Inter-State Trading Company, deeds covering the tracts in Kansas and Missouri, less parts of the former that had been sold, most of the proceeds having been applied to cutting down the incumbrances. On February 13, 1908, Holden and the Holden Company brought an action against the bank and the Inter-State Trading Company, alleging in substance that the deeds had been given by way of security for the indebtedness owing to the bank, and asking, if this should be found to have been paid in full, a decree quieting title; otherwise a decree declaring title to be held under the deeds as security for whatever balance should be found due. The defendants maintained that the deeds were intended as absolute conveyances, and operated as such. The court found, in accordance with the report of the referee before whom the case was tried, that the defendants were precluded, by their course of dealing with the plaintiffs, from claiming the absolute title to the land; that the plaintiffs should be allowed to redeem it by paying the defendants what they had in it, amounting at that time the action was begun to $81,091.93, this including the first mortgage, which the bank had purchased; the judgment was rendered that if the plaintiffs should pay this amount (which had been reduced to $65,233.67 by sales of land made during the litigation) within six months, their title should be quieted; that if they failed to make the

payment within that time they should be barred of all interest in the land. The defendants appeal on the ground that the court should have denied the plaintiffs any relief whatever. The plaintiffs appeal upon two principal grounds: (1) that in the accounting they should not have been charged with interest on the note given to the bank, because by the exaction of usury all interest thereon had been forfeited; and (2) that the first mortgage should not have been enforced against them otherwise than by a foreclosure and sheriff's sale.

"The plaintiffs complain of some of the findings of fact made by the referee and approved by the court. The objections have been examined, and are found not to be well taken. The findings will therefore be spoken of as the established facts. The details of the transactions will be stated no further than is thought necessary to present the questions of law that are regarded as controlling.

"The flood of 1903 rendered a part of the Kansas land temporarily unproductive, and occasioned loss to Holden, who in consequence failed to keep up his payments of interest and taxes. The deeds in question were executed in connection with two written contracts entered into on May 12 and May 14, 1904. The referee found that these contracts were intended to include and did include all matters in negotiation between the parties up to the time of their execution. The defendants maintain that they show that the deeds were intended as absolute conveyances, and that oral evidence is not admissible to give them a different effect. We reach the conclusion, however, that the writings them-

selves, interpreted in the light of the situation of the parties, show that the deeds did not divest the mortgagor of the right to redeem the property.

"The contract of May 12 was made between the Interstate Trading Company and Holden. This company was a corporation organized, owned and operated by the bank, for its own convenience, and for practical purposes the bank and the corporation were the same. The Holden company sustained the same relation to Holden" (Opinion of the Supreme Court of Kansas, Record 253 and 254).

We quote further from the opinion, as follows:

"As this court concludes that the relations of the parties has at all times been in effect that of mortgagor and mortgagee, the appropriate remedy is a foreclosure and sale. In effect at least the indebtedness is now all extinguished except a part of the first mortgage, the precise situation depending upon the application of payments. There would be no purpose in attempting to apportion the remainder between the first and second mortgage, and the order will be made for the sale of the property to pay the balance due.

"Usury was charged and collected upon the Holden note. By the national banking act the exaction of usury destroys the interest bearing quality of the debt. The referee decided that the plaintiffs were estopped from claiming the benefit of that provision. Nothing was said about usury until the present action was begun. Whether or not an actual estoppel has arisen, it was proper un-

der the circumstances, in view of the equitable relief sought, that the plaintiffs should be charged with the principal and legal interest" (Opinion, Record page 260).

It was settled by the Supreme Court of Kansas that the transaction in question constituted a mortgage—a local question, which is not now open for review by this court. The sole question for the determination of this court is the construction of the National Banking Act in reference to usury. The Supreme Court of Kansas found and decided that the bank was guilty of violating the National Banking Act and that it thereby forfeited all right to collect any interest on the indebtedness, but refused to enforce the plain provisions of the statutes, because this was a suit in equity.

It was claimed by the plaintiffs (Record 31), and is shown by the record, that the transaction was always treated by the defendant bank as a mortgage (Record, 95). After the bank had collected large sums of money from the sale of securities and otherwise, the plaintiffs frequently demanded a statement of the account, which the bank as frequently agreed to render, but failed to do so until the bank went into the hands of the receiver and plaintiffs were compelled to ask for an accounting by instituting this action.

The record shows that there was no dispute about the usury charges. The findings of fact asked for by plaintiffs in reference thereto should have been given, as they were supported by the undisputed evidence. The findings requested are shown on pages 219 and 220 of the

record. It will be seen that the $80,000 note given by Mr. Holden to the bank was infected with usury in its inception, and that in the renewals thereof the interest was compounded thereon oftener than once a year, in violation of the statutes of Missouri. The defendant bank, being located in Missouri, was not allowed under the National Banking Act, to charge a greater rate of interest than was allowed by the laws of Missouri. The laws of Missouri were pleaded and offered in evidence.

Under the laws of Missouri, Section 3705 of the Revised Statutes of Missouri of 1899, said bank was only allowed to charge 'interest at the rate of 6 per cent per annum, when no other rate was agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts, after they become due and demand of payment is made.' Section 3706 provides that "parties may agree in writing for the payment of interest, not exceeding 8 per cent per annum, on money due or to become due on any contract." And Section 3711 provides that "parties may contract in writing for the payment of interest upon interest, but interest shall not be compounded oftener than once a year." The laws of Missouri allowed no greater rate of interest to be charged than is provided in the foregoing sections.

In plain positive terms the National Banking Act provides (Section 5198) that "the taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it or

which has been agreed to be paid thereon." The decision of the Supreme Court of Kansas nullified this plain provision of the National Banking Act upon the sole ground that the provisions of the National Banking Act could not be invoked in an equitable proceeding such as the one at bar, and thus is presented the sole question for the determination of this court.

While the Supreme Court of Kansas decided that "usury was charged and collected upon the Holden note," by which the interest-bearing quality of the debt was destroyed, and that "plaintiffs should be charged with the principal and legal interest," it adopted the accounting made by the referee without modification. In the accounting plaintiffs were charged not only with the legal rate of interest, but with the usurious rate (See page 238 of the record). It will be observed that plaintiffs were charged as high as ten per cent on many of the items, while the highest contract rate in Missouri was eight per cent, and the legal rate was only six per cent.

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of the State of Kansas erred in its judgment, decision and decree, in denying plaintiffs in error the rights, privileges and immunities guaranteed to them by sections 5197 and 5198 of the Revised Statutes of the United States, being a part of the National Banking Act of the United States, under which plaintiffs in error were entitled to have all the interest charged in the transaction in question forfeited on account of the usury charges made by the defendant, The National Bank of Commerce of Kansas City, Missouri.

II.

The Supreme Court of the State of Kansas erred in refusing to entertain the plea of usury made by plaintiffs in error herein, and, in denying to plaintiffs in error the right to have all of the interest carried with and agreed to be paid in the notes in question forfeited on account of the usury charges as provided by sections 5197 and 5198 of the Revised Statutes of the United States, being a part of the National Banking Act of the United States.

III.

The Supreme Court of the State of Kansas erred in deciding that plaintiffs in error were estopped from claiming the forfeiture of all interest on account of usury charges, as provided by said National Banking Act, for the reason that, "nothing was said about usury until the present action was begun." The said court having de-

cided that "usury was charged and collected upon the Holden note," and that the interest bearing quality of the debt was thereby destroyed by the provisions of the National Banking Act, erred in deciding that plaintiffs in error were estopped from claiming the right to have all of said interest forfeited because they failed to plead said act until this action was begun.

IV.

The Supreme Court of the State of Kansas erred because said court, after having found that the interest bearing quality of the debt in question was destroyed on account of the usury charges under the National Banking Act, in deciding and adjudging that "in view of the equitable relief sought that the plaintiffs should be charged with the principal and legal interest" and thus denying to plaintiffs in error rights, privileges and immunities guaranteed to them by the laws of the United States which provisions were specially invoked by plaintiffs in error.

V.

The Supreme Court of the State of Kansas erred because the said court, after having decided that the interest bearing quality of the debt was destroyed by reason of the usury charges and that plaintiffs in error should be charged only with the principal debt and legal interest, in adopting the findings and conclusions of the trial court and referee, under which plaintiffs in error were charged not only with interest at the legal rate, but were also charged with the illegal, excessive and usurious rate contrary and inconsistent with the law as declared by the said court.

POINTS AND AUTHORITIES.

I.

The provisions of the National Banking Act are plain and positive, wherein it is provided that by charging a greater rate of interest than is allowed by the laws of the State of its domicile, a national bank forfeits all interest carried with and agreed to be paid upon any note, bill, or other evidence of debt. Section 5197 and 5198 of the National Banking Act. The courts have uniformly construed these sections to mean just what they say.

Brown v. *Marion Natl. Bank*, 169 U. S. 416.
Farmers Natl. Bank v. *Dearing*, 91 U. S. 29.
Haseltine v. *Central Natl. Bank*, 183 U. S. 132.
Lucas v. *Natl. Bank*, 78 Pa. St. 228.
Citizens Natl. Bank (of Mo.) v. *Donnell*, 195 U. S. 369.
Citizens Natl. Bank v. *Donnell*, 172 Mo. 384.
Danforth v. *Natl. Bank*, 48 Fed. 271.
Natl. Bank v. *Hoagland*, 7 Fed. 159.
Overhalt v. *Natl. Bank*, 82 Pa. St. 490.
Shafer v. *First Natl. Bank*, 53 Kans. 614.
First Natl. Bank v. *Stauffer*, 1 Fed. 188.

II.

The execution of renewal notes bearing upon their face a legal rate of interest does not purge the transaction of usury, nor estop the maker of the note from claiming usury. The taint of usury in the first transaction follows down through the whole, and the borrower is en-

titled to a credit for all the interest which has been charged into the renewal notes from the beginning, and the bank is limited in its recovery to the principal sum originally loaned less all partial payments.

Brown v. *Natl. Bank*, 169 U. S. 416 (*supra*).
Danforth v. *Natl. Bank*, 48 Fed. 271 (*supra*).
Natl. Bank v. *Hoagland*, 7 Fed. 159 (*supra*).

And other cases cited under subdivision One.

III.

When a National Bank violates the law by charging a greater rate of interest than is allowed by the state of its domicile, its paper is rendered barren and unfruitful by the very terms of the National Banking Act. "It is a dead note thereafter so far as the interest is concerned." There is no way to fructify the sterile note and make it bear interest.

Lucas v. *Natl. Bank*, 78 Pa. St. 228 (*supra*).
First Natl. Bank v. *Stauffer*, 1 Fed. 188 (*supra*).
Guthrie v. *Reid*, 107 Pa. St. 251, 257.
Danforth v. *National Bank*, 48 Fed. 271.

IV.

The enforcement of the plain provisions of this legislative enactment is not made to depend upon the forum or the form of the action. Courts of equity as well as courts of law are bound thereby, for "equity follows the law."

Farmers Nat. Bank v. *Dearing*, 91 U. S. 29.
Vandergriff v. *Swinney*, 158 Mo. 527.
Morrison v. *Miller*, 46 Iowa 84.

Brown v. *Dewey*, 1 Sandf. Ch. (N. Y.) 56.
Cope v. *Wheeler*, 41 N. Y. 303.
Scott v. *Austin*, 36 Minn. 460.
Exeley v. *Berryhill*, 37 Minn. 182.
Johnson v. *Smith*, 39 Iowa 549.
First Natl. Bank v. *Clark*, 161 Ala. 497.
Lyon v. *Smith*, 111 Mo. App. 277.
M. K. & T. Trust Co. v. *Krumsey*, 172 U. S. l. c. 357; S. C. 77 Fed. 32.
Olds v. *Curlett*, 145 Fed. 661.
Bigler v. *Jacks*, 114 Iowa, 667.
Allen v. *Fogg*, 66 Iowa 229.
Turner v. *Turner*, 80 Va. 379.
Edmunds v. *Bruce*, 88 Va. 1007.
Pervis v. *Woodward*, 78 Miss. 922.
Lowe v. *Loomis*, 53 Ark. 454.

V.

Section 5197 and 5198 (*supra*) are not penal in their nature, but remedial, and must be construed liberally to defeat the mischief they were designed to overcome.

Cit. Nat. Bank v. *Donnell*, 172 Mo. 384, S. C. 195 U. S. 369.
Natl. Bank v. *Dearing*, 91 U. S. l. c. 36.
Danforth v. *Natl. Bank*, 48 Fed. l. c. 275 (*supra*).
Bletz v. *Natl. Bank*, 87 Pa. St. l. c. 94.
Ordway v. *Natl. Bank*, 47 Md. 217.
Crocker v. *Natl. Bank*, 4 Dillon l. c. 362.
Ferguson v. *Sutphen*, 8 Ill. l. c. 566, 567.
Kreibohm v. *Yancey*, 154 Mo. l. c. 85.
Lyon v. *Smith*, 111 Mo. App. 277 (*supra*).

ARGUMENT.

There is absolutely no dispute about the facts in this case. The defendant National Bank was located in the State of Missouri, and, under the National Banking Laws, it could charge no greater rate of interest than was allowed by the laws of the State of Missouri. The rate of interest to be charged was regulated solely by the laws of Missouri.

Out of the $80,000 note dated July 1, 1901, the bank took out in advance and reserved as interest $6,471-11, being interest calculated on $80,000 for one year and five days at the rate of eight per cent per annum, and also charged the further sum of $426.67 for interest on $80,000 at the rate of eight per cent per annum from June 7, 1901 to July 1, 1901. There was no written contract for charging eight per cent interest from June 7th to July 1st. Mr. Holden received from the bank on July 1, 1901 the sum of only $73,102.22, as the net proceeds of the $80,000 after said interest had been taken out. Mr. Holden at the same time paid the bank out of the $73,102.22 the two notes held by the bank aggregating the sum of $40,000, the loan having been made partly for that purpose (Record, 34). This extortionate rate of interest was in plain violation of law, and tainted the note with usury from its inception. Hence, the Supreme Court found that "usury was charged and collected upon the Holden note. By the National

Banking Act the exaction of usury destroys the interest bearing quality of the debt."

In addition to this usury charge, the bank, in the various renewals of the note, compounded the interest oftener than once a year, in violation of the Missouri interest laws. So that the note was not only infected with usury in its inception but tainted with usury on each renewal, and the Supreme Court of Kansas, while recognizing that the note was usurious, and that its interest bearing qualities were completely destroyed, refused to enforce the plain provisions of the National Banking Act, stating that "the referee decided that the plaintiffs were estopped from claiming the benefit of that provision. Nothing was said about claiming usury until the present action was begun." Then, without passing upon that proposition, the court proceeds to state and decide that "whether or not any actual estoppel has arisen, it is proper under the circumstances, in view of the equitable relief sought, that the plaintiff should be charged with the principal and legal interest."

It is not necessary to notice the suggestion about an estoppel, as the law is too well settled that the maker of a note is never estopped from pleading usury by signing a written contract for the renewal of the indebtedness. The referee seems to have decided that because Holden failed to claim the usury until the suit was brought that he was estopped from asserting that right. Of course, there is absolutely nothing in this point.

But the point really decided by the Supreme Court of Kansas brings us face to face with the only proposition in this case left for the determination of this court. That proposition is plainly stated in the case of *M. K & T. Trust Company* v. *Krimsey*, 172 U. S. l. c. 357, wherein the court say: "Can a borrower of money upon usurious interest successfully seek the aid of equity in cancelling the debt without making an offer to repay the loan with lawful interest?" And this court decided that he could, answering the question in the affirmative. The court in that case recognized the principle of equity which seems to have been the stumbling block in the way of the Supreme Court of Kansas in this case, by deciding that any rule of equity or law must give way to the provisions of legislative enactments. In that case, under the laws of Minnesota, the creditor not only forfeited the interest, but the principal as well. In other words, the Minnesota law is much more drastic than the National Banking Act. It will be recalled that at one time a National Bank forfeited its right to collect the principal as well as the interest, and such is the law of New York and many other states today. Everywhere and in all ages, strenuous efforts have been made to stay the hand of the usurer.

Much is said in this day and age about judicial legislation, but it occurs to us that judicial annulment of a plain legislative enactment is proceeding just a step further. Why should it make any difference, when it comes to the enforcement of a plain provision of statutory law, as to whether one party or the other was

plaintiff or defendant, or whether the matter was brought to the attention of the court in a proceeding at law or in equity? Has a chancellor any greater right or discretion to refuse to administer a law plainly written than any other court or judge? While there is a maxim, of doubtful import, coming down to us that "he who asks equity must do equity," still there is another maxim, more certain and capable of enforcement, which says that "Equity follows the law."

For a court of equity to refuse to enforce a positive legislative enactment on the ground of some common law doctrine or equitable rule, is illogical and unreasonable, and it has been so determined in many courts of high authority. We quote from some of the decisions, as follows:

The case of *Lyons* v. *Smith*, in the Missouri Court of Appeals (*supra*), was a suit in equity to cancel a mortgage securing a usurious note. The court used the following language:

> "But defendant says the case must fail because plaintiff does not in his petition tender or offer to pay the defendant the amount admitted to be given to the borrower—the $360.
>
> "That in an equitable proceeding such as this, the maxim that 'he who seeks equity must do equity' operates to prevent the cancellation of the mortgage without repayment of the amount actually loaned * * * To give effect to the contention of the defendant would be to nullify the plainly expressed legislative intent, and this cannot and should

not be done in the administration of either law or equity. There is no equity for plaintiff to do as a condition precedent to relief. Defendant of his own volition corrupted his security. The mortgage was and is void *ab initio*, and he cannot, as he seeks to do, predicate rights upon a lien that never existed.

"The right to charge interest for the use of money is in legal contemplation a creation of legislative enactment. It did not exist under the civil law, nor in England until authorized by Act of Parliament in the reign of Henry VIII. It is therefore a matter under the control of the legislative power.

"For courts of equity to impose conditions amounting practically to a refusal to enforce a penalty provided by statute for the infraction of usury laws requires nothing less than an invasion of the rights of a co-ordinate branch of government."

Again, it was stated by the court in *Vandergriff* v. *Sweeney* (*Supra*):

"Neither the language nor the spirit of the act warrants the restriction of the plea of usury to actions wherein the party of whom usury has been exacted is made a defendant therein, as contended by appellants, but its provisions were intended to apply whenever the question as to the liability of the principal obligations upon which usury has been paid is drawn in controversy.

"The plea is as availing where affirmative relief is asked by him of whom usury has been exacted (as in the case at bar) as it would be for

the same person to affirm its existence when he is sued upon the principal obligation and a credit to that extent asked in discharge thereof. The statute is that usury may be pleaded and when usurious interest is found to have been paid, it shall be deemed to be paid upon the principal debt and credited thereon, in all civil actions instituted in the courts of this state, regardless of the question whether the action has been instituted by the party receiving or paying the usurious interest. * * * We see no reason why a curtailment of its (the law's) meaning should be attempted by a process of judicial construction.

"It is not 'a shield to be used by the debtor when suit is brought against him and not otherwise.'"

Again, in *Morrison* v. *Miller*, (*supra*) the Court says:

"It is urged in support of the demurrer, that plaintiff should have tendered six per cent interest with principal sum, in order to entitle him to invoke the aid of the Court of Equity. * * * Equity should follow the law and we see no reason why a party should be required to pay more or less, depending upon the forum or form of action in which he seeks relief from enforcement of the illegal contract.

"It is next urged that under Sec. 2080 of the Code, usury can only be taken advantage of by a defense to an action and cannot be set up as a basis for original affirmative relief. We do not believe the statute should receive any such narrow construction as to show that the use of plaintiff and de-

fendant, as designating the lender and borrower, should preclude all investigation into the character of the loan, only in cases where parties appear before the court in a particular attitude."

In *Cope* v. *Wheeler*, 41 N. Y. 303 (*supra*) the Court says:

"The defense of usury, while the statute against usury remains, is entitled to the same consideration as any other defense. It cannot be disregarded or treated as unconscionable and subjected to more strict rules of construction than other defences."

Johnson v. *Smith*, 39 Iowa 543 (*supra*), is a suit in equity brought by the plaintiffs to have an absolute deed of certain land adjudged to be a mortgage and to redeem therefrom.

The Court says:

"The footprints of the usurer are very clearly visible through the whole of the transactions. * * The plaintiffs are entitled to a decree for a reconveyance of the land by the defendant upon the payment of the money which they have tendered. * * * (which was amount originally actually loaned). A judgment will also be rendered in favor of the school fund for ten per centum on the actual sum loaned."

In *Exley* v. *Berryhill*, 37 Minn. 182 (*supra*) the court says:

"The point that the plaintiff cannot maintain this action without offering to pay what may be

still unpaid of the money actually received with legal interest, has just been decided adversely to the appellant in the case of *Scott* v. *Austin*, 36 Minn. 460."

Again it is said:

"The Statute is not therefore a practice act. It abrogates a rule of equity law and secures to the maker of usurious securities a substantive right, which may be enforced according to the established and well understood equity practice. It is immaterial whether the right be called legal or equitable. It is an absolute right and one of which no court can deprive the party. Its enforcement is not dependent upon the discretion of the chancellor, nor can a rule of decision based on the supposed authority of the maxim that 'he who asks equity must do equity' prevail over a positive statute expressly abrogating that rule of decision. When a court of equity is called upon to deal with a right given by statute, then it accepts and acts upon that other maxim that 'Equity follows the law.' It is not competent for any court to take away from the citizen a right secured to him by a valid exercise of legislative power. 'Rights', says the Supreme Court of the United States, 'under our system of law and procedure do not rest in the discretionary authority of any officer, judicial or otherwise.' *In re Parker*, 131 U. S. 221. * * * It is well known that the equity rule of decision, the application of which the appellant is insisting on in this case, rendered the usury laws nugatory in many cases."

M. K. & T. Trust Co. v. *Krumsey*, 77 Fed. 32.

Again, in *Ferguson* v. *Sutphen*, 8 Ill. l. c. 566, 567, (*supra*), quoted and approved in *Kreibohm* v. *Yancey*, 154 Mo. l. c. 85, 86, the Court say:

> "The law against usury is founded on principles of public policy, principles that have been for ages recognized, and almost universally adopted. Without inquiry into the policy or justice of the statutes for the prevention of usury, it is the imperative duty of the judicial tribunals to faithfully execute them. If there is any injustice or impolicy in these enactments, the fault rests with the legislature, and it must provide the proper corrective, and not the courts. Whenever the injured party invokes the aid of the courts, and presents a case clearly within the statute, there should not be the least hesitation in applying the appropriate remedy. The only effectual mode of discouraging and preventing the practice of usury, is by a rigid enforcement of the provisions of the statute. If a case comes within the mischief of the statute, it should be held to be within the remedy."

Again, it is said by this court:

> "When a statute creates a duty and prescribes a penalty for its non-performance, the rule prescribed by the statute is the conclusive test of liability."
>
> *Yates* v. *Natl. Bank*, 206 U. S. 158.

The Kansas Supreme Court, in deciding this case, relies solely for its authority upon the proposition under discussion on what is said in 39 Cyc. 1010 and 1012. It will be observed that even that quotation does not

sustain the decision in this case. The author, in his usual careful manner, notes the very exception that we are contending for here in reference to this rule of equity, but this seems to have escaped the attention of the Kansas court. The author states "When the borrower appears in any capacity in a court of equity asking affirmative relief against a usurious contract to pay money, such relief will"—and then the author carefully states, "*in the absence of a statute providing otherwise*, be granted him only upon condition of his doing equity; that is, tendering the money actually due." Then again, in the same paragraph, the author says, "*In the absence of a statute providing otherwise*, if the contract for the usurious interest is still executory, the sum that is equitably due is the principal with legal interest." But for the exceptions noted by the author, his statement of the law would be radically wrong, and contrary to law.

One of the leading cases in the construction of this National Banking Act is the old case of *Brown* v. *Marion Natl. Bank*, (*supra*), in which Mr. Justice Harlan delivered the opinion of the court, and in which the court says:

> "No matter how many renewals have been made, if the bank has charged a greater rate of interest than is allowed by law, it must, if the forfeiture clause of the statute be relied on, and the matter is called to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid."

The statute has always been enforced by this court according to its plain letter. Thus it is said:

> "The disregard of the text and the confusion as to the purpose of the law which the argument involves disappear if the statute be harmoniously enforced according to its letter and spirit. By both it is apparent that the statute on the one hand causes a forfeiture of the entire interest to result from the taking, receiving, reserving or charging a greater rate of interest than is allowed by law."
> *Lake Benton Natl. Bank* v. *Mills*, 184 U. S. 155.

The forfeiture provided in Section 5198 is entirely a creature of the federal statute. It is not dependent upon any general principles of law, nor upon any so-called equity rules, nor upon any state statute, for its enforcement. It is a legislative enactment pure and simple, which abrogates any and all principles of common law or equity inconsistent therewith. It is above and beyond them all. It cannot be *frittered away nor toned down* by common law or equity rules of however long standing, nor by the statute laws, nor by the decisions of any of the courts of any state. Its interpretation and enforcement are peculiarly within the jurisdiction of this court. We submit this case in the utmost confidence that this court will, as it ever has done, enforce the plain and positive provisions of this National Banking Act.

We respectfully submit that the decision of the Kansas Supreme Court should be reversed, and the cause remanded with directions that an accounting be

had, and that in such accounting all interest be eliminated from the indebtedness in question, in accordance with the provisions of said Section 5198 of the Federal Statutes; or that the court compute the balance, if any, of the indebtedness due, and direct the Kansas Supreme Court to enter judgment accordingly.

Very respectfully submitted,

EDWARD P. GARNETT,
Solicitor and of Counsel for Plaintiffs in Error.

OLIVER H. DEAN and
CHARLES BLOOD SMITH,
Of Counsel.

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NUMBER 354.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

THE HOLDEN LAND AND LIVE STOCK COMPANY AND WILLIAM D. McLEOD, ADMR., WITH THE WILL ANNEXED OF HOWARD M. HOLDEN, DECEASED, AND MARY F. HOLDEN, WIDOW, AND WILLIARD M. HOLDEN, BERTHA L. LAUTERBACK AND HALE HOLDEN, HEIRS AT LAW OF HOWARD M. HOLDEN, PLAINTIFFS IN ERROR,

VS.

THE INTERSTATE TRADING COMPANY, THE NATIONAL BANK OF COMMERCE OF KANSAS CITY, MISSOURI, AND GEORGE I. CUTTS, RECEIVER OF SAID BANK, DEFENDANTS IN ERROR.

PLAINTIFFS' BRIEF AND ARGUMENT ON MOTION TO DISMISS.

CHAS. BLOOD SMITH &
EDWARD P. GARNETT,
Solicitors of Counsel for Plaintiffs in Error.

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PLAINTIFFS' BRIEF AND ARGUMENT ON MOTION TO DISMISS.

The only question involved in this writ of error is the construction of the federal statute relating to the interest that may be collected by a national bank. The question involved in the pleadings and in the opinion of the court is the construction of Sections 5197 and 5198 of the National Banking Act.

At every step and stage of the proceedings in this case, from the filing of the bill until the case was finally disposed of by the Kansas Supreme Court, the plaintiffs have urged and insisted upon the rights, privileges and immunities guaranteed to them by the National Banking Act, wherein it is provided (Section 5197) that a national bank "may take, reserve or charge on any loan or discount made or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the *laws of the state*, territory or district *where the bank is located and no more*," and that "(Section 5198) The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon."

There were two questions presented on the appeal to the Kansas Supreme Court. Quoting from that decision, they were: "(1) That in the accounting they (the plaintiffs) should not have been charged with interest on the note given to the bank because by the exaction of usury all interest thereon had been forfeited, and (2) that the first mortgage should not have been enforced against them otherwise than by foreclosure at a sheriff's sale." The Supreme Court of Kansas decided in favor of plaintiffs in error on the second proposition and decided that the transaction was a mortgage, and directed a mortgage foreclosure. On the first proposition raised, the Supreme Court, while deciding that "usury

was charged and collected upon the Holden note. By the National Banking Act the exaction of usury destroys the interest bearing qualities of the debt," at the same time denied to plaintiffs in error the rights, privileges and immunities granted to them by the National Banking Act and refused to eliminate the interest from the transaction. By so doing, the Supreme Court of Kansas utterly ignored the plain provisions of the National Banking Act and took away from the victim of the usurious transaction rights which were guaranteed to him by the National Banking Act.

The Supreme Court of Kansas was brought face to face with the question as to whether it would enforce the provisions of the National Banking Act or whether it would ignore those provisions and decide the case upon questions which the learned counsel for defendant in error are pleased to denominate "general principles of law entirely unaffected by the question of whether or not any usury had been claimed or exacted in any of the transactions between the parties to this suit" (Deft's. Brief, p. 6). If the jurisdiction of this court can be ousted by any such method, it will lose its power to review the action of any state court on any federal question. All that would be necessary would be for the state court upon some pretext and upon some state law or general law to decide the proposition at issue contrary to the federal law and thus evade the plain provisions of the federal statute.

It would seem hardly necessary to cite authorities in support of the jurisdiction of this court, where the

construction of the National Banking Act is involved. We do not believe that a single case can be found where this court has refused to entertain jurisdiction when the state court undertook to interpret the provisions of this National Banking Act. On the other hand, this court has uniformly taken jurisdiction in those cases.

In *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 134, this court, by Mr. Justice Brown, said:

> "We understand it to be conceded that as the note in question was given to a national bank, a definition of usury and *penalties affixed* thereto must be determined by the National Banking Act, and *not by the state law*. *Farmers & Mechanics Bank* v. *Dearing*, 91 U. S. 29. In that case it was held that a law of New York forfeiting the entire interest for usury was superseded by the National Banking Act, and that such law was only to be regarded in determining the penalty for usury."

Among the many cases bearing on this question we cite only the following:

Schuyler National Bank v. *Gadden*, 191 U. S. 451.

Brown v. *Marion National Bank*, 169 U. S. 416.

National Bank v. *Ragland*, 181 U. S. 45.

Barnett v. *National Bank*, 98 U. S. 555.

National Bank v. *Dearing*, 91 U. S. 29 (*supra*).

Lake Benton National Bank v. *Watt*, 184 U. S. 151, 155.

Citizens National Bank v. *Donnell*, 195 U. S. 369.

We find no fault with the general proposition of law raised by defendant in error as set forth in the quotations of opinions of this court in several cases, such as the following:

> "To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively not only that the federal question was presented to the state court, but that a decision thereof was necessary to a determination of the cause, and that it was decided adversely to the party claiming the right."
>
> *Eustis* v. *Bolles*, 150 U. S. 361, and other cases along the same line.

The trouble is the cases cited do not fit the facts of this case. Here, the federal question presented for decision by the state court was *absolutely necessary to a determination of the case*. The case could not have been decided without passing upon this federal question, upon the face of the decision itself. Still there is no question but what this court would have the right to examine the whole record in this case to determine whether or not the federal question was passed upon. (*Kansas City Southern Railway Co.* v. *Albers Comm. Co.*, 223 U. S. 594). When the record is examined it will be found that this suit is primarily for an accounting against the defendants in error in order to ascertain the amount due upon the indebtedness which was secured by the mortgages in question. The deeds together with the written contracts of defeasance constituting the mortgages as decided by the Kansas Supreme Court.

The only excuse given by the Supreme Court of Kansas for not enforcing the plain provisions of the National Banking Act, was that the plaintiffs were compelled to seek their remedy in a court of equity for an accounting and in order to procure a release of the mortgages, and that for that reason they were precluded from the benefits of the law.

In other words the Kansas Court read into Section 5198 of the National Banking Act a proviso not found therein. The act nowhere provides that the forfeiture created by said section shall not be enforced in suits in equity. Yet the Kansas Court says in plain terms, that when the victim of an usurious transaction is compelled to go into a court of equity to obtain merited relief, he shall be deprived of rights given him by said section. A National Bank cannot violate the laws of its existence with impunity and escape the penalty therefore by forcing its victim to go into a court of equity in order to obtain an accounting and a release of the securities held.

The decision is not only contrary to the plain provisions of the National Banking Act, but to every decision of this court construing said act. No single case can be found in any of the decisions of this court holding that the forfeiture clause of said Section 5198 cannot be invoked by a plaintiff in an equity suit. On the contrary this court has in every instance enforced the plain and explicit provisions of Section 5198 whenever its attention has been called to the violation of said act by a National Bank.

Thus it is said by Mr. Justice Harlan in the case of *Brown* v. *Marion National Bank*, 169 U. S. 416, speaking for the court:

> "The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than is allowed by law, *it must*, if the forfeiture clause of the statute be relied on, and *the matter is called to the attention of the court*, lose the entire interest which the note carries or which has been agreed to be paid."

The statute has always been enforced by this court according to its plain letter. Thus it is said:

> "The disregard of the text and the confusion as to the purpose of the law, which the argument involves disappear if the statute be *harmoniously enforced according to its letter and spirit*. By both it is apparent that the statute on the one hand causes a forfeiture of the entire interest to result from the taking, receiving, reserving or charging a rate of interest greater than is allowed by law."
>
> *Lake Bento First National Bank* v. *Mills*, 184 U. S. 155.

The forfeiture provided in Section 5198 is entirely a creature of the Federal Statute. It is not dependent upon any principles of general law, nor upon any state statute. It is above and beyond them all. It cannot be *frittered away* nor *toned down* by the statute laws, nor by the decisions of the courts of any state. Its interpretation and enforcement are peculiarly within the jur-

isdiction of this court. Which has ever exercised the right to review the decisions of the state courts in reference thereto.

It goes without saying that a state court cannot ignore the plain provisions of a federal statute and proceed to decide a case upon what it might consider general principles or law repugnant to such provisions.

Beyond any sort of question this court has jurisdiction herein, and, we therefore respectfully ask that the motion to dismiss should be overruled.

CHAS. BLOOD SMITH &
EDWARD P. GARNETT,
Solicitors of Counsel for Plaintiffs in Error.

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NUMBER 354.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

The Holden Land and Live Stock Company, William D. McLeod, Administrator With the Will Annexed of Howard M. Holden, Deceased, and Mary F. Holden, Widow, and Willard M. Holden, Bertha L. Lautenbach, and Hale Holden, Heirs-at-law of Howard M. Holden, Deceased, Plaintiffs in Error.

vs.

The Interstate Trading Company, the National Bank of Commerce of Kansas City, Missouri, and George T. Cutts, Receiver of said Bank, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY BRIEF BY PLAINTIFFS IN ERROR.

EDWARD P. GARNETT,
Solicitor and of Counsel for Plaintiffs in Error.

OLIVER H. DEAN and
CHARLES BLOOD SMITH,
Of Counsel.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY BRIEF BY PLAINTIFFS IN ERROR.

The whole of defendant's brief and argument rests upon the erroneous assumption that we are in a court of equity asking favors to which we are not legally entitled, and that we should pay a price for the favors granted. The learned judge who wrote the opinion in this case seems to have been imbued with the same idea

when he says: "In view of the equitable relief sought, the plaintiff should be charged with the principal and legal interest." Now, the truth of the matter is that plaintiffs are not asking one single thing in this suit to which they are not entitled as an absolute and unqualified legal right. This is manifest when we consider the real purpose of the suit as shown in the pleadings, the findings of the referee and the decision of the Kansas Supreme Court.

It may not be out of place to suggest the real situation of the parties at the time this suit was brought. In May, 1904, the defendant bank held Mr. Holden's overdue note which was secured by certain collateral notes, chief among which was a note for $82,000 secured by a mortgage on the Kansas real estate in question. Owing to the unprecedented flood which inundated the Kaw Valley, in which the lands were situated, a great deal of the property of the Holden ranch was destroyed and Mr. Holden was unable to meet his obligations to the bank promptly. Negotiations were begun between Mr. Holden and Dr. Woods, who represented the defendant bank, looking to the re-arrangement of the securities held by the bank. There were no negotiations whatever looking to the purchase of the lands by the bank, and that statement of defendant's counsel is not supported by the record. It will be seen by the record that there was absolutely nothing said about the "purchase of the lands".

Arrangements were finally consummated by which deeds were made to the real estate in controversy, accompanied by contracts of defeasance, which gave Mr. Hold-

en six months within which to pay his notes by the sale of the land or otherwise. Being unable to effect sales of the lands and pay the note within that period, arrangements were made with the bank to allow Mr. Holden to sell the land in tracts and make partial payments. Under this arrangement, and up to the time the suit was brought, the bank had received from the sale of the securities over $100,000, as shown by the referee's report at pages 234, 235, and 236 of the record.

The referee found that upon the face of the deeds and contracts the title passed to the representative of the bank, but that the course of dealings between Mr. Holden and the bank operated as an estoppel on the bank to assert any title to the real estate, and, after ascertaining from the face of the papers the amount still due the bank, recommended that plaintiffs were entitled to a decree permitting them to redeem the land upon the payment of the amount due (Record 239). The Supreme Court of Kansas, however, decided, properly, that on the face of the papers themselves the mortgage relation was not terminated, and "that the relation of the parties has at all times been, in effect, that of mortgagor and mortgagee. The proper remedy is a foreclosure sale", and this was the contention of plaintiffs. The plaintiffs not only contended that the transaction was simply a rearrangement of the securities and that the relation of mortgagor and mortgagee continued after May, 1904, but also claimed that this relation was recognized by the defendants from that date up to the time the suit was brought.

The plaintiffs also contended that "they have often requested and urged the officers of the said bank to render a statement and account of such indebtedness, and although such officers repeatedly promised and agreed to and with said plaintiffs to render an account and statement of such indebtedness during the year 1906 and prior thereto and since that time, said bank has failed and neglected and now neglects, fails and refuses to account to the plaintiffs or either of them for the money received by said bank on account of said notes and mortgages. Plaintiffs say and charge that said bank has out of the sale of the property of the Holden Land and Live Stock Company and from other sources collected and received an amount in excess of any balance due on said indebtedness of said Holden to said bank, and that the said lands of said Holden Land and Live Stock Company described in said pretended warranty deed should be released and discharged from all liens on account of such mortgage." (Record 16) In this connection, the referee found that:

> "After October 12, 1904, the plaintiff Holden several times, verbally and in correspondence with the officers and agents of the defendant bank, spoke of his being indebted to the bank and requested a statement of the amounts that had been received by the bank, which statement was promised to be furnished him by the president of the bank, but was not; and in substance the plaintiff Holden claimed in these statements that the transaction of May 12, 1904, was in the nature of a mortgage, which claims of plaintiffs were neither affirmed nor denied when made" (Record 230).

Mr. Holden continued to demand a statement of the account with the bank up to the time the bank went into the hands of the receiver, and all of the defendants' assets, including the Holden notes and the real estate in question, were transferred to the receiver of the bank. It then became absolutely necessary in order to protect their rights, for the plaintiffs to bring this suit for an accounting. Up to the time this suit was brought, and until the answer was filed herein, the defendants had never disputed Mr. Holden's claim that the deeds and contracts were simply mortgages to secure the indebtedness to the bank. In fact, as has been said, and it was so found by the Supreme Court of Kansas, the papers upon their face showed a mortgage relation.

The suit, therefore, was to have this relation declared, and to this relief the plaintiffs had an absolute and unqualified right. It did not rest in the discretion of the chancellor to give or withhold this right, nor was it to be purchased of the chancellor. The court had no right to fix any conditions upon which it would grant the relief to which the plaintiffs were legally entitled on the face of the papers.

Likewise were the plaintiffs absolutely entitled to the accounting, which the bank had agreed but failed to give. The bank had received from its collaterals over $100,000. It held both the first and second mortgage on the real estate, and the plaintiffs had an absolute right to know what disposition the bank had made of the large sums of money which it had received from the collaterals held by it. The granting of this relief

was not a matter of discretion with the chancellor. The court had no right to impose any terms as the price of granting this relief. The plaintiffs were not supplicating for unmerited favors. They were demanding absolute, unqualified rights. This was not a suit to redeem in any sense of the term. Plaintiffs were not buying back something they had lost. The title to the real estate had never passed out of the mortgagor. This was totally unlike a case where the property had been foreclosed and sheriffs' deed executed when the owner of the property, on account of some peculiar hardship attending the transaction appealed to a court of equity to exercise its discretion in permitting him to redeem or buy back his property, when the chancellor, in exercising this discretion, was authorized to impose such terms as he might deem equitable. In the case at bar, it cannot be contended that the plaintiffs were asking anything that appealed to the discretion of the chancellor.

In addition, the plaintiffs asked that if the debt had been paid the property be released and discharged of all liens on account of the mortgage. Of course they had an absolute right to have the liens discharged when the debt was paid.

What was said by defendants' counsel (Brief 8) in regard to the proceeding for an order to inspect the defendants' books being in the nature of a bill of discovery, and the authorities cited in reference thereto, need hardly be noticed. There is absolutely nothing in it. It had none of the elements of a bill of discovery. The defendants' conscience was not sifted by it. They were

not required to disclose under oath any facts relating to usury charges. It was simply a legal proceeding provided by statute, whereby either party to a suit would be permitted to inspect the books of the opposite party. We take it counsel are not serious in this contention, and pass it without further notice.

Incidental to the accounting which plaintiffs sought, plaintiffs set up and proved that the note held by the defendant national bank was tainted with usury, whereby its interest bearing qualities were destroyed under the plain provisions of the national banking act, and invoked the provision of that act which forfeited the interest carried with and which was agreed to be paid on the note held by the bank. The interest bearing quality of the note having been destroyed, only the principal could be figured in the accounting. The right to have the interest eliminated from the accounting was not an equitable right depending upon the discretion of the chancellor. It was a legal right pure and simple—a statutory right provided by the National Banking Act, the provisions of which were as binding upon the conscience of the chancellor as upon any other judge sworn to administer the laws of the land.

Defendants seem to contend that there was no usury charged, and that the opinion of the Supreme Court of Kansas was "a rather careless statement, and that plaintiffs only abstracted their own evidence and none of the evidence produced by the bank is mentioned or referred to" (Defendants' Brief 14). This statement is in direct opposition to the record in this case, and, even if it were

not so, there was a plain method provided whereby the defendants could have printed an additional part of the record. Every part of the evidence bearing upon this usury charge is printed in the record. Mr. Holden testified in regard to the $80,000 note as follows:

"Q. How much did you get as the net proceeds of this loan of $80,000 from the bank?

A. $73,102.22, I believe that is the correct amount.

Q. That is all the money you received from the bank as the net proceeds of the $80,000 loan?

A. It was.

* * * * * * *

Q. Do you have any independent recollection of what rate of interest they charged you on the $80,000 loan?

A. 8 per cent.

Q. On what amount?

A. 8 per cent on $80,000.

Q. Calculated for how long?

A. I think it was for one year and five days, up to the 4th of July. There were three days of grace, and then the 4th of July, so it was really due on the 5th of July, I suppose, making a year and five days, I think.

Q. And the $426.67; what rate was that?

A. 8 per cent.

Q. On what amount?

A. $80,000.

Q. Had you any written contract with the bank agreeing to pay 8 per cent on $80,000 for that period of time?

A. Not that I know of or have any recollection of. I am sure that I didn't.

Q. Had you any contract with them to pay interest on that sum from the 7th of June to July?
A. I have no recollection of anything of the kind, and nothing was ever said before regarding this that I know of, and I am sure that there was not" (Record 34).

Dr. Woods, president of the bank, the only other party to the transaction, was examined fully with regard to this, and he corroborates the testimony of Mr. Holden. His testimony will be found on pages 151 and 152 of the record.

From this testimony it is manifest that the bank not only reserved out of the $80,000 loan the interest on that amount for one year and five days calculated at the rate of 8% per annum, but that in addition to that amount it reserved the sum of $426.67 as interest on $80,000 from June 7th to July 1st at the rate of 8% per annum. There was no written contract to pay 8% per annum on this amount between those dates. The only excuse that Dr. Woods gave for making this charge was that Mr. Holden had spoken to him about the loan on June 7th, and he told Mr. Holden that he would have to agree to pay interest from that date. There being no written contract, under the Missouri statutes the bank was only entitled to charge 6% in any event.

But in addition to that, the bank was not holding $80,000 for Mr. Holden from June 7th, for $73,102.22 was all the money that Mr. Holden got out of the $80,000 loan. Not only so, but the bank at that time held Mr. Holden's notes aggregating the sum of $40,000,

which were taken up out of the loan (Record 222), so that the amount that Mr. Holden really got was only $33,102.22, and that was the only amount which the bank was holding for him. If it had any right at all to charge interest on that because it was holding the amount in order to make the loan, it could only charge, under the Missouri statutes, 6% on this $33,102.22.

It is held by high authority that a bank is not authorized to take out interest in advance for a longer time than the banking period of 90 days. It can be readily seen that if they are allowed to take out interest in advance for a year and five days, they might take out interest in advance for two years, or three, or four, or for any number of years, until the whole amount is taken out and the debtor would give his note without receiving anything for it. Then again, it is held, that where the creditor takes out interest in advance the interest shall only be calculated on the amount actually received by the debtor. That is to say: Mr. Holden only received $73,102.22, and yet he paid the highest contract rate under Missouri laws on $80,000 for one year.

But aside from this exorbitant and extortionate rate, the reserving of $426.67 rendered the transaction usurious beyond any sort of question. It could be shown, also, that thereafter in compounding interest oftener than once a year, the bank violated the interest laws of Missouri (Referee's Finding, Record 222), but it is not necessary to go into that proposition, as the note was tainted with usury in its inception. There is, therefore, nothing in the contention of the defendant that the

Kansas court was wrong in deciding that the bank had charged and collected usury on the note.

The case cited in our brief of *Citizens National Bank* v. *Donnell*, 172 Mo. 384, affirmed by this court in 195 U. S. 369, fully covers the interest laws of Missouri.

Taking up the points of the defendants' argument in the order in which they are presented, we readily concede that we cannot in this action, or in any other action unless brought under the provisions of the National Banking Act within two years, recover back any part of the usurious interest which had been paid as interest. Nor are we seeking in this action to recover back any interest that has been paid as interest. Thousands of dollars were paid to the bank as interest on the $80,000 note which we can never recover back, it matters not how rank with usury the transaction may have been. At the maturity of the note the plaintiffs paid interest thereon, monthly in advance, which was calculated on the $80,000 note, although Mr. Holden only received $73,102.22 (Referee's Finding Record 222). These large amounts cannot be recovered back in any action, and we are not seeking to recover the same. The only thing that plaintiffs are entitled to is that in this accounting all the interest that has been reserved and calculated into and agreed to be paid on the $80,000 note and its renewals, be eliminated therefrom.

The only other contention of the defendants is discussed under their points two and three in their brief, from page 16 to its close, all of which relates to the same general proposition. The gist of the contention is that

courts of equity are not compelled to obey the plain statutory enactment requiring the forfeiture of all interest resulting from the charge of usury, unless the statutes which require the forfeiture of all interest are supplemented by other legislation requiring courts of equity as well as courts of law to enforce the statute, and they say:

> "However, no statute of the United States or of the State of Kansas has ever undertaken to modify or change this general rule of equity, and the same has been expressly recognized in this court, as shown by the citation in *Hubbard* v. *Todd* and *Tiffany* v. *Boatmans Institution, supra*, and the decision of the Supreme Court of Kansas now under consideration" (Deft's Brf. 20).

In other words, a court of chancery has a discretion in the matter of enforcing the plain statutory enactment unless the legislature specifically provides that the law shall be enforced as well by courts of equity as by courts of law. This may be a blunt way of stating the proposition, but nevertheless it is the logic of the contention. If they are correct in their contention, National banks can violate the law of their existence with impunity by arranging their security in such a manner that the borrower would be compelled to seek the aid of a court of equity to secure his rights. There would be no uniformity in the enforcement of the law regulating National banks, as the different states of the union have different local rules governing their courts of equity.

The only case cited by counsel from this court is the Tiffany case in 18 Wallace, 375, so much relied upon

by counsel. That case does not touch the question at issue. The court was not dealing with a statutory provision regarding the forfeiture of interest. That was a suit to recover back both principal and interest because of usury. It was not bottomed upon any statute, and the plaintiff was seeking equitable relief under general equity rules. In that case, after deciding that the contract under which the money was obtained, was void because of the usury charged, the court say:

> "But it does not follow in cases of usury if the contract be executed that the court of chancery on application of the debtor will assist him to recover back both principal and interest. To do this would be to aid one party to an illegal transaction and to deny redress to the other. Courts of equity have a discretion on this subject and have prescribed the terms upon which their powers can be brought into activity. They will give no relief to the borrower if the contract be executory except on the condition that he pay to the lender the money loaned with interest. Nor if the contract be executed, will they enable him to recover more than the excess he has paid over the legal interest."

That case is wholly unlike the one at bar. Here there is a federal statute which provides in plain and unambiguous terms just what the result will be if a National Bank charges usury. Nor is this a suit in which plaintiffs are seeking to recover back either principal or interest. They are not invoking the discretionary powers of the chancellor for any purpose. They demand only what is their legal right. Plaintiffs are not invoking the aid of a court of chancery for relief against usury. The

forfeiture provided by the statute does not depend upon the discretion of the chancellor. It is in no sense an equitable right. It is a legal right pure and simple, given by statutory law. This distinguishes the case at bar from the cases cited by the defendants. No case has been cited, and none can be found, where this court has ever compelled the borrower to pay the debt and legal interest as a condition for the enforcement of the forfeiture provided by the National Banking Act. Such a condition would be in the very teeth of the statutory law. It would nullify its plain provisions.

We are not unmindful of the fact that there are some few state courts, interpreting the laws of their own states, which have held that although the statute provided the forfeiture of all interest, yet those provisions of the statute would not be enforced where the debtor was compelled to go into a court of equity to seek equitable relief; but the great weight of authority is against this doctrine, and it has no foundation whatever in reason.

Counsel say that

> "However, with the exception of the states where the local laws or the construction of such laws by the supreme courts of such states, constitutes a statutory modification of the general rule, no decision can be found denying the right of a court of equity to impose such terms as it deems right and just as a condition precedent to the allowance of the relief sought" (Brf. 24).

From this statement we take it that counsel did not read the cases referred to in our brief. It is true that in some of those cases there was a special provision of

the statute requiring courts of equity to enforce its provisions. But why there was or could be any necessity for a statute requiring courts of equity to enforce the plain provisions of any law is a mystery to us. A chancellor is as much bound under his oath to enforce the law as any other judge. It seems, however, in some states, that the *high courts of chancery* would not enforce the laws against usury unless compelled to do so.

One of the cases from the state courts so much relied upon by the defendants is an old Alabama case, and it is worthy of note that when the courts of equity in that state refused to enforce its statutes against usury the legislature by special act compelled them to do so; so that now, in all of the late decisions in that state, the usury laws are enforced as well in courts of equity as in courts of law, as will be seen from the case of *National Bank* v. *Clark*, 161 Ala. 497, referred to in our brief. There are, however, many cases cited in our brief in which courts of equity without any special provision of the statute requiring them so to do, unhesitatingly enforced the provisions of the statutory laws of the state against usury. Take the cases cited by us from Virginia, Missouri, Mississippi, Iowa, and many other states that might be cited.

The case of *Bigler* v. *Jack*, 114 Iowa, 667, was a suit in equity to declare a deed, absolute on its face, to be a mortgage, and to redeem the lands covered thereby. In positive terms, the Supreme Court of Iowa declares the rule in that state to be that the usury laws are

enforceable in suits in equity as well as at law. At page 672 of the report the court say:

> "Again it is contended on the part of defendant that, as forfeiture of interest for usury is in the nature of a penalty, a court of equity will not lend its aid to a borrower to enforce this penalty in a suit brought by him to redeem. There is much to be said in favor of this position, but it has not commended itself to this court. We have therefore established a different rule in several cases. *Morrison* v. *Miller*, 46 Iowa, 84; *Johnson* v. *Smith*, 39 Iowa, 549. See also, *White* v. *Lucas*, 46 Iowa, 319; *Allen* v. *Fogg*, 66 Iowa, 229."

In Mississippi, the language of the usury statute is very similar to the National Banking Act, and the reasoning of the cases from that state apply with peculiar force to the question under consideration.

Take the case of *Purvis* v. *Woodward*, 78 Miss. 922, cited in our brief, and also the case of *Southern Home Building and Loan Association* v. *Tony*, 78 Miss. 916.

(a)

In the latter case, Justice Terral of the Supreme Court of Mississippi, in holding that the rule: "He who seeks Equity must do Equity" will not apply to defeat the plain provisions of the law, even though the borrower is compelled to resort to a Court of Equity to assert his rights, uses the following language:

> "The further question is presented here, whether the borrower, Tony, in order to stop the sale of his land by the trustee, may do so in equity, except upon the terms of repaying the sum bor-

rowed and legal interest thereon. Section 2348, code 1892, provides: 'And if a greater rate of interest than ten per centum shall be stipulated for or received in any case, *all interest shall be forfeited,* and may be recovered back, whether the contract be executed or executory.'

"*If this plain statute is to be construed according to its letter, we see no reason for requiring Tony to pay any part of the usurious interest contracted for; for such effect would nullify the statute to that extent.* It is undoubtedly a maxim in equity 'that he who seeks equity must do equity.' But can there be an equity in any person to *receive that which the law forbids him to take?*

"If a person pays usurious interest, it is clear that he may recover the whole at law, because the statute secures that right to him. Now, if the contract be exigible *in pais,* why may not the collection of the usurious interest be stopped by the intervention of the chancery court? *As a party in this latter case can have no redress except in an equity court, he would be without a remedy for a clear right unless that court gives him its assistance.* For his right not to have this usury collected of him is as clear and as strong as his right to recover the same when paid. And because a deed of trust is exigible *in pais* by the party himself, and the remedy at law was to suffer its collection and then sue for its return, after, perhaps, his property had been sacrificed by reason of its sale for the payment of usury, the court, in *Parchmen* v. *McKinney,* 12 Smed. & M. 631, held that he might go into equity and stop the sale to the extent of the usury demanded. *Parchman* v. *McKinney* is fully supported by *Long* v. *McGregor,* 65 Miss. 70. When the case was first submitted to us we were inclined to think that *Mortgage Co.* v. *Jefferson,* 69 Miss. 770, was intended to overrule *Parchman* v. *McKinney,* but a more extended

consideration induces us to think we misunderstood the argument of the learned judge. The doctrine of *Parchman* v. *McKinney* authorizes Tony, as we think, in claiming exemption from paying any part of the interest contracted for. It results from this view that the court erred in requiring Tony to be charged upon his debt to the Southern Building & Loan Association, with six per centum per annum interest."

In the case of *Parchman* v. *McKinney, et al.*, 12 Smedes' and Marshall's Reports (Mississippi) page 631 this question is fully considered, and an able opinion rendered by Chief Justice Sharkey. On this point he says, as follows:

"There can be no difficulty in deciding that the transaction was usurious. A similar contract was held to be so in *Torrey* v. *Grant*, 10 S. & M. 89. *But the question is, shall the creditor be allowed any interest? His right to it is maintained on the principle that the party who resorts to a court of chancery to be relieved against a usurious contract, must pay the principal and legal interest; that the excess above legal interest is the extent to which the court will go in giving relief.* That such is the rule adopted and followed by the current of decisions is not to be doubted; but can it be applied to the present case? The rule originated under the rigid provisions of the statute of 12 Anne, which made all usurious contracts void, and imposed heavy penalties on the usurer; but our law is entirely different. Let us see then how far the reasons which gave rise to this rule, will apply in this altered state of the law. It has its foundation in the discretion which the courts of equity are said to have possessed in granting or withholding relief. On this foundation, and on this only can it rest. The cases in which relief was

sought in a court of chancery, were generally, and perhaps invariably, cases in which a remedy at law might have been had, or in which discovery was sought to sustain the defense at law, and hence it has been said that the court was not positively bound to interfere, but has a discretion on the subject, and may prescribe the terms on which relief will be given. Having that discretion, the rule was applied, that he who seeks equity must do equity. It was regarded as against conscience, that the borrower should pocket the money loaned without being compelled to return what was really due, as that would be to make the statute which was intended to prevent fraud, the instrument of fraud. But at the same time, equity would not assist the lender, as that would be aiding a wrong-doer. See I Story, Eq. Jur. 322, Par. 301, 302; 1 Fonbl. 24, note (h); *Rogers* v. *Rathbun*, 1 Johns. Ch. R. 367.

"Now *mark the difference. Our statute docks the interest only, and leaves the right to the principal unimpaired; and it inflicts no punishment on the lender.* With regard to the discretion of the court in a case like this, it is certainly not clear that it can have any, whatever may be said in ordinary cases, unless indeed we say, that in every case a court of chancery has no other rule than discretion. *The complainant had no remedy at law.* The parties had provided a summary remedy in a court of chancery. From the peculiar character of a deed of trust, and the mode of proceeding to enforce it, relief against it is a subject of original and primary chancery jurisdiction; and it is also exclusive, for a court of law cannot reach it. *This party then is not to be treated as though he had been negligent in making his defense in another tribunal. He stands on the same ground that the defendant does, who is making his defense at law when sued on a usurious contract. He makes his*

ground of relief in the appropriate tribunal, the only tribunal that can hear it, and at the first opportunity. He is not therefore a proper object for such terms as the court in its discretion may think proper to impose. But again, it is not against conscience for him to seek this remedy. He has not the money of the defendant, there was no loan of money. But above all, the statute made to prevent usurious contracts is protected; its end and object accomplished; it is not made the instrument of fraud. *The general rule is, that courts of equity must follow the law, and they cannot depart from it without some obvious reason. For these reasons it would seem, that the general rule, requiring the party to pay the principal and legal interest, cannot apply in this case.* And this accords with the opinion of the chancellor in *Monks* v. *Morris*, 4 Hen. & Mun. 463, which was a very similar case. The bill was brought for relief against deeds of trust, which the trustee was about to carry into effect, on the ground of usury, and against the same objections here raised, the party was held not to be entitled to interest."

In the case of *Marks against Morris*, 4 Hening & Munford's Rep. (Va.) page 463, the same question in reference to the statutes of Virginia, came before the superior court of Chancery of that state. In that case the Chancellor in holding that the principle, "he who seeks equity must do equity", does not apply in this kind of a case, says as follows:

> "And so with respect to the present plaintiff; his property was to have passed off under the hammer of the cryer, but for the interposing hand of this court. He is then the applicant here for relief, to which he is most clearly entitled; but the question is, as to the extent of that relief. The

> answer is, that he must do justice, so far as the law will authorize it, in order to obtain it; and therefore he must pay the principal money *without any interest;* and the defendant must be deprived of all *gain* by the contract, which was *corrupted by the usury,* pay costs, and stand discharged from all other penalties of the act."

Take, also, the Missouri cases—and there are a number of them besides those cited in our brief. There is no specific provision in the Missouri statute requiring the courts of equity to enforce the usury laws, and yet they unhesitatingly enforce those laws in the same manner that they would enforce any other statutory law. The reason given is logical and sound, and, it seems to us, unanswerable, as will be seen in the case of *Lyons* v. *Smith,* referred to on page 17 of our brief. Also *Henderson* v. *Talman,* 130 Mo. App. 498.

This being a Missouri contract, if its enforcement is controlled by any state law sit would be the laws of Missouri.

It is true that this court has never passed upon the identical question under consideration, but in every case that has come before it, this court has unhesitatingly enforced the plain provisions of the National Banking Act without adding to or taking anything therefrom. On the very face of the National Banking Act it will be seen that it provides not only a shield of defense, but a weapon of attack. The only difference is, that if the borrower is compelled to come into court to obtain his rights he gets twice as much as if he had waited to be sued, showing that it was the intention of Congress not

to limit the right to cases in which the borrower happened to be the defendant. This court said very recently:

> "National banks are prohibited from making usurious contracts. If they disregard this provision, the law not only furnishes a defense, but gives a right of action". (*McCarthy* v. *First National Bank*, 223 U. S. l. c. 489).

Counsel go so far as to challenge the right of Congress to prescribe rules for the government and control of state courts in their general equitable jurisdiction, from which it may be inferred that the claim is made that National banks are not exclusively controlled by the Act of Congress, but can be controlled by State legislation or rules of equity provided in state courts. This contention has been refuted so often by this court that it is hardly necessary now to say anything further in regard thereto. Take for instance the case cited, *Barnett* v. *Bank*, 98 U. S. 555, in which the court uses this language:

> "The statutes of Ohio and Indiana upon the subject of usury may be left out of view. They cannot effect the case. Where a statute creates a new right, or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive."
>
> *Farmers & Mechanics Bank* v. *Dearing*, 91 U. S. 29.

In the latter case, this court said that the section is "Remedial as well as penal, and is to be liberally construed to effect the objects which Congress had in view in enacting it."

Again, it is said:

> "National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of public service. They are means appropriate to that end. Such being the nature of these National institutions, it must be obvious that their operations cannot be limited or controlled by state legislation. * * * If Congress have a constitutional power to regulate a particular subject and they do regulate it in a given manner, and in a certain form, it cannot be that state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to provide additional regulations, and what they may deem auxiliary provisions for the same purpose. In such case the legislation of Congress in what it does prescribe manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. *Its silence as to what it does not do is as expressive of its intention as the direct provisions made by it.* * * * The states can exercise no control over National banks, nor in any wise affect their operation, except so far as Congress may see fit to permit."
>
> *Easton* v. *Iowa*, 188 U. S. l. c. 237.

We may suggest that the *courts* of a state are not above its law making powers. If the legislature of a state is powerless to make any provisions or impose any terms as a condition for the enforcement of the forfeiture provisions of the National Banking Act, certainly the courts have no such power.

Further replying to the contention of counsel that there is no statute of the United States *forbidding* courts of equity to impose terms as a condition for the enforcement of the National Banking Act, we beg to suggest

that there is no statute of the United States and no provision of the National Banking Act *denying to the victim* of the usurious contract the relief afforded by this plain provision of the statute in *suits in equity*. It nowhere provides that courts of equity may impose any conditions for its enforcement. The act nowhere provides that the forfeiture of the interest resulting from the usury can only be claimed by a defendant in suits at law. It no where provides that the section is not applicable when the victim is compelled to go into a court of equity to seek redress, and, "its silence as to what it does not do is as expressive of its intention as the direct provisions made by it", according to the decision of this court above referred to.

If congress had intended to limit the forfeiture clause of the National Banking Act to suits at law, it would have said so in plain terms. The section which provides for the forfeiture of all interest by National banks when usury is charged is sweeping and far reaching. It is unqualified by any provisions or restrictions. Neither the state legislatures nor the state courts can add to or take away anything from it. Says this court in speaking of another provision of Congress:

> "While no case involving this precise question seems to have arisen in this court, we have several times had occasion to hold that when Congress has dealt with a subject within its exclusive power * * * * it is not competent for states to invade that domain of legislation and enact laws which in any way trench upon the power of the federal government."
>
> The Roanoke, 189 U. S. 197.

Again, it is said by this court:

> "The full liability of National Bank directors then, * * * * being governed by the National Banking Act, it is self evident that the rule expressed by the statute is exclusive, because of the elementary principle that when a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed by the statute is the exclusive test of liability. *Farmers Bank* v. *Dearing*, 91 U. S. 29 and cases cited."
>
> *Yates* v. *Jones National Bank*, 206 U. S. 179.

The provisions of the National Banking Act are as plain as the English language can make them. It provides that "taking, receiving, reserving, or charging," more than the lawful rate of interest shall be deemed a forfeiture of the entire interest. In other words, the very act of taking unlawful interest, or receiving unlawful interest, or reserving it, or charging it, destroys the interest bearing quality of the note or other evidence of debt. There is nothing in what the borrower does or can do that destroys the interest bearing quality of the note. But the very moment that the National bank violates the law of its existence and takes that which does not belong to it—takes that to which it has no right—it forfeits the right to collect any interest on the debt. It is the unlawful act of the bank that destroys the interest bearing quality of its paper. At the very moment it laid its unclean hands upon that which did not belong to it, it destroyed the interest bearing quality of its paper, and from that moment on, the note was a dead letter so far as its interest was concerned. Its interest bearing quality had

been completely destroyed, and was destroyed at the time the note was made; and the Kansas Supreme Court very properly said that the "interest bearing quality of the note was destroyed." From the time of its inception, on down to the present time, there has been no life or vitality in the defendant's paper so far as bearing any interest is concerned. It took no affirmative act on the part of the maker of the note to destroy its interest bearing quality. Nothing that he has done or could do could more effectually destroy the interest bearing quality of the note. It was already destroyed. So that when the refere came to make his accounting, and the note was presented to him, he had no right or authority to calculate any interest thereon. He had no right to give the defendant National Bank credit on account of that note except for the sum which was received by Mr. Holden as the proceeds of it—the net sum. It was not a question of discretion for the chancellor. He had no right to condone the offense. He had no right to give to the bank that which did not belong to it. He had no power to breathe back into that note the life of its contract for interest which had been destroyed in its inception. The filing of a suit in equity in this case could not possibly impart life and vitality into the dead note—could not fructify a sterile note so as to make it bear interest.

It has been seen that the rate of interest which the bank was permitted to charge was regulated solely by the laws of its domicile; that in Missouri, where the bank was located, the contract rate was 8% and the legal rate was 6%. Yet the referee, in his accounting, which

was approved by the Kansas Supreme Court, charges interest on the Mutual Benefit note at the rate of 10% per annum. The bank had no right to draw that rate of interest and the court had no right to give the bank anything to which it was not legally entitled. We call attention to this so that this court may in remanding this case direct that only the legal rate of interest shall be calculated on the balance of $73,000 due on the first mortgage Mutual Benefit note which was originally $90000. Ten per cent was also allowed on quite a number of other items in the accounting, all of which will be found on page 238 of the record. A glance at that page will show that the accounting is loaded with usury up to its brim. Even the Kansas Supreme Court, after disregarding the forfeiture clause of the National Banking Act, decided that the bank was only entitled to have interest on the amount actually loaned at the legal rate, which, in Missouri, as has been seen, is six per cent; and yet, by oversight, we take it, it approves the accounting made by the referee herein, in which the plaintiffs are charged with 8 per cent on the $80,000 note when the actual amount received was only $73,102.22; and other interest charges as appears from the record are computed at rates as high as ten per cent.

We respectfully submit that this case should be reversed and remanded with directions to the Kansas Supreme Court to eliminate from the $80,000 note in question and its renewals all interest carried therewith and which was agreed to be paid thereon, and to eliminate

from the Mutual Benefit note all interest calculated thereon in excess of the legal rate of six per cent as provided by the laws of Missouri, and that all others usurious interest, as shown in the record, be eliminated in the accounting.

Respectfully submitted,

EDWARD P. GARNETT,
Solicitor and of Counsel for Plaintiffs in Error.

OLIVER H. DEAN and
CHARLES BLOOD SMITH,
Of Counsel.

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Office Supreme Court, U. S.
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IN THE

Supreme Court
of the United States

THE HOLDEN LAND AND LIVESTOCK COMPANY and WILLIAM D. McLEOD, Administrator with the Will Annexed of Howard M. Holden, Deceased, and MARY F. HOLDEN, Widow, and WILLARD M. HOLDEN, BERTHA L. LAUTENBACH and HALE HOLDEN, the Heirs at Law of Howard M. Holden, Deceased,
Appellants,

vs.

THE INTER-STATE TRADING COMPANY, THE NATIONAL BANK OF COMMERCE of Kansas City, Missouri, and GEORGE T. CUTTS, Receiver of said Bank,
Appellees.

No. 354.

OCTOBER TERM, 1913.

BRIEF AND ARGUMENT ON MOTION TO DISMISS.

Printing Department Kansas Farmer, Topeka, Kansas.

IN THE

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STATEMENT OF FACTS.

This was a suit brought by the appellants in the District Court of Shawnee County, State of Kansas, for the purpose of having certain deeds, absolute on

their face (by which the appellees held the title to certain lands in Missouri and Kansas) declared to be mortgages, and for an accounting to determine the amount due. The relief asked was a cancellation of the deeds, in the event that nothing was found to be due, otherwise a decree declaring the title to be held under the deeds as security for whatever amount should be found to be due.

Before the trial, an amended petition was filed, setting up a claim of usury, in violation of the provisions of the national banking law in the original transaction between the parties, and asking that the forfeitures and penalties provided by the law should be applied in reduction of whatever amount might otherwise be found to be due. The statement of the facts in the case, contained in the opinion of the Supreme Court of the State of Kansas, is as follows:

"On June 6th, 1901, The Holden Land and Livestock Company executed to the Mutual Benefit Life Insurance Company a mortgage for $90,000 due in five years, upon a tract of land in Shawnee County, containing about 5,603 acres, of which it was the record owner. On July 1st, 1901, The Holden Land and Live Stock Company executed a note to Howard M. Holden for $82,000, secured by a second mortgage on the same tract. This note and second mortgage, with other security, Holden at once transferred to the National Bank of Commerce of Kansas City, Missouri, to secure his note to that bank for $80,000, bearing the same date, due in one year and drawing eight per cent interest, which was subsequently renewed. Holden

had personally purchased a tract of land in Missouri, borrowing a part of the amount necessary for the purpose from the bank. To secure the bank the deed was made to one W. H. Winants. Afterwards, it was agreed that he should hold the title as further security for Holden's note to the bank. In May, 1904, Holden caused to be executed to the Inter-State Trading Company deeds covering the tracts in Kansas and Missouri, less parts of the former that had been sold, most of the proceedings having been applied to cutting down the incumbrances. On February 13th, 1908, Holden and the Holden Company brought an action against the bank and the Inter-State Trading Company, alleging in substance that the deeds had been given by way of security for the indebtedness owing to the bank, and asking, if this should be found to have been paid in full, a decree quieting title, otherwise, a decree declaring title to be held under the deeds as security for whatever balance should be found due. The defendants maintained that the deeds were intended as absolute conveyances, and operated as such. The court found, in accordance with the report of the referee before whom the case was tried, that the defendants were precluded, by their course of dealing with the plaintiffs, from claiming the absolute title to the land; that the plaintiffs should be allowed to redeem it by paying the defendants what they had in it, amounting at the time the action was begun to $81,091.93, this including the first mortgage, which the bank had purchased; judgment was rendered that if the plaintiffs should pay this amount (which had been reduced to $65,233.67 by sales of land during the litigation) within six months their title should be quieted; that if they failed to make the payment within that time they should be barred of all interest in the land. The defendants appeal on the ground that the court should have denied the plaintiffs any relief whatever. The plaintiffs appeal upon two principal grounds: (1) that in the accounting they should

not have been charged with interest on the note given to the bank, because by the exaction of usury all interest thereon had been forfeited; and (2) that the first mortgage should not have been enforced against them otherwise than by a foreclosure and sheriff's sale." *Holden Land and Live Stock Company, et al, vs. The Inter-State Trading Company,* 87 Kan., 221.

Both parties appealed from the decision of the trial court, and the two appeals were consolidated and tried and decided as one case by the Supreme Court of Kansas. The full text of the syllabus by the court, and the opinion, will be found in Volume 87, Kansas Reports, page 221, et seq.

Upon a consideration of all the facts and circumstances of the case, the state court held that the appellants would be permitted to redeem upon payment to the appellees of the actual amount of money found to be due, together with legal interest on the same. That part of the syllabus of the Supreme Court of Kansas, bearing upon this phase of the case, reads as follows:

"Where a party asks a court to declare a deed to be in effect a mortgage, he may be required, as a condition to receiving such equitable relief, to forego the advantage of any statutory penalties for the exaction of usury, and submit to a charge of the principal of the debt and legal interest."

That part of the opinion of the Supreme Court of Kansas, bearing upon this point, reads as follows:

"Usury was charged and collected upon the Holden note. By the national banking act the exaction of

usury destroys the interest-bearing quality of a debt. The referee decided that the plaintiffs were estopped from claiming the benefit of that provision. Nothing was said about usury until the present action was begun. Whether or not an actual estoppel has arisen, it was proper under the circumstances, in view of the equitable relief sought, that the plaintiffs should be charged with the principal and legal interest.

" 'When the borrower appears in any capacity in a court of equity asking affirmative relief against a usurious contract to pay money, such relief will, in the absence of a statute providing otherwise, be granted him only upon condition of his doing equity, that is, tendering the money actually due. . . . The rule . . . applies when the relief sought is the reformation or cancellation of a deed, or mortgage or other instrument evidencing or securing a usurious debt, or an injunction against threatened damaging action by the creditor, or in fact, whatever be the character of the relief sought. . . . In case the usurious interest has been reserved, or paid in advance, the amount equitably due is the principal debt less the usurious excess of interest paid. In the absence of statute providing otherwise if the contract for the usurious interest is still executory the sum equitably due is the principal debt with legal interest thereon.' (39 Cyc. 1010-1012.)" *Live Stock Co. vs. Trading Co.*, 87 Kan., 233, 234.

The only federal question involved in this case was that with reference to the claim of usurious interest under the provisions of the national banking act.

ARGUMENT.

In the view of the law of this case taken by the Supreme Court of the State of Kansas, the question of

usury became immaterial. The case was decided upon general principles of law, entirely uneffected by the question of whether or not any usury had been claimed or exacted in any of the transactions between the parties to this suit.

The appellants sought certain equitable relief which was granted upon conditions named by the court. The fact that a question of usury, under the Federal statute, was raised in the case by the appellants, does not avail to establish the jurisdiction of this court. It has been repeatedly held by this court that where the finding of the lower court was broad enough to sustain the decree without reference to the federal question, this court has no jurisdiction. It does not matter in such a case whether the federal question was decided or not, nor whether it was decided correctly.

"Where a finding, which does not involve a federal question, is broad enough to maintain the decree, even though the federal question involved in another defense was decided wrong, this court will affirm the decree, without considering that question or expressing any opinion upon it." *Jenkins vs. Lowenthal*, 110 U. S. 222.

"If it appear in a case, brought here in error from a state court, that the decision of the state court was made upon rules of general jurisprudence, or that the case was disposed of there on other grounds, broad enough in themselves to sustain the judgment without considering the federal question, and that such question was not necessarily involved, the jurisdiction of this court will not attach." *New Orleans vs. New Orleans Water Works*, 142 U. S. 79.

"The rule is well settled that, even if a federal question was raised in the state court, yet if the case was decided on grounds broad enough in themselves to sustain the judgment, without reference to the federal question, this court will not entertain jurisdiction. The authorities in support of this rule are too numerous for citation." *Delaware City Nav. Co. vs. Reybold,* 142 U. S. 643.

"It is well settled, by a long series of decisions of this court, that where the highest court of the state, in rendering judgment, decides a federal question, and also decides against the plaintiff in error upon an independent ground, not involving a federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the federal question." *Rutland R. R. vs. Central Vermont R. R.,* 159 U. S., 641.

"To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the federal laws or constitution." *Eustis vs. Bolles,* 150 U. S., 361.

In *Beaupre vs. Noyes,* 138 U. S., 397, the court says:

"Whether the state court so interpreted the territorial statute as to deny such right to the plaintiffs in error, we need not inquire, for it proceeded, in part, upon another and distinct ground, not involving any federal question, and sufficient, in itself, to maintain the judgment, without reference to that question. . . . Whether sound or not, we do not inquire. It is broad enough, in itself, to support the final judgment, without reference to the federal question."

"Where there are two grounds for the judgment of a state court, one only of which involves a federal

question, and the other is broad enough to maintain a judgment sought to be reviewed, this court will not look into the federal question." *Bacon vs. Texas*, 163 U. S., 207.

The following cases illustrate the same rule: *Missouri Pacific R. R. Co. vs. Fitzgerald*, 160 U. S., 556; *Mutual Life Assn. vs. Hammond*, 139 U. S., 293; *McManus vs. O'Sullivan*, 91 U. S., 578; *Bolling vs. Lersner*, 91 U. S., 594; *Murdock vs. City of Memphis*, 87 U. S., 590.

Upon the authority of the cases above cited, we respectfully submit that the appeal in this case should be dismissed.

LEONARD S. FERRY,
THOMAS F. DORAN,
JOHN S. DEAN,
Counsel for Appellees.

ELIJAH ROBINSON, *of Counsel.*

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SUPREME COURT, U. S.
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In the Supreme Court
of the United States.

THE HOLDEN LAND AND LIVESTOCK COMPANY AND WILLIAM D. McLEOD, ADMINISTRATOR WITH THE WILL ANNEXED OF HOWARD M. HOLDEN, DECEASED, AND MARY F. HOLDEN, WIDOW, AND WILLARD M. HOLDEN, BERTHA L. LAUTENBACH AND HALE HOLDEN, THE HEIRS AT LAW OF HOWARD M. HOLDEN, DECEASED, *Appellants*,

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No. 354.

OCTOBER TERM, 1913.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

Brief and Argument on Behalf of Appellees.

LEONARD S. FERRY,
THOMAS F. DORAN,
JOHN S. DEAN,
Counsel for Appellees.

ELIJAH ROBINSON,
Of Counsel.

In the Supreme Court

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Brief and Argument on Behalf of Appellees.

STATEMENT.

1. ON June 7th, 1901, Howard M. Holden borrowed from The Mutual Benefit Life Insurance Company $90,000, and from The National Bank of Commerce of Kansas City, Missouri, the sum of $80,000. These sums of money were borrowed for the purpose of paying off a mort-

gage to Quincy A. Shaw, on certain lands owned by said Holden in Shawnee county, Kansas, and also to pay off certain notes held by the bank against Holden and The Brush Creek Mining Company, a corporation, owned by Holden, and to provide funds for other business in which Mr. Holden was at the time extensively engaged. The note to The Mutual Benefit Life Insurance Company was executed on the 6th day of June, 1901, but for some reason there was no note executed to the bank at the time by Mr. Holden for the $80,000 loaned. However, the bank held the money subject to Mr. Holden's order, and on July 1st, 1901, the indebtedness was renewed by the execution to the bank of a note for $80,000, bearing date of July 1st, 1901, and payable one year after date. On July 1st, 1901, Mr. Holden paid the bank $426.67 as interest on the $80,000 note from June 7th to July 1st, 1901. (Record, p. 34.) At the time of the execution of the note for $80,000, interest at the rate of 8 per cent per annum for one year and four days (the time for which the note ran) was deducted from the face of the note, and the net proceeds were paid to Mr. Holden.

This $80,000 note was secured to the bank by the deposit of various collateral securities, chief among which was a note for $82,000, executed by the Holden Land and Live Stock Company, and payable to Howard M. Holden, bearing the same date as the note executed by Mr. Holden to the bank. The $82,000 note was secured by a second mortgage on lands in Shawnee county, Kansas. The Shawnee county lands were covered by the mortgage to The Mutual Benefit Life Insurance Company for the sum of $90,000, which was a first lien on the same. As a further security on the loan made by the bank to Mr. Holden, the title to 110 acres of land in Jackson county, Missouri, was conveyed to the cashier of the bank. This latter tract of land was at the time subject to a first lien of $4200, evidenced by a trust deed in favor of one Corrigan. Mr. Holden was unable to pay his note to the bank when the same became due, but renewed the same from time to time, paying interest in advance to the bank on the same at the time of such renewals. (Record, pp. 222, 223.) During the period covered by these renewals of the principal debts, various tracts of the Shawnee county lands were

sold, and part of the income of the lands, together with the proceeds of such sales, were applied partly to the payment of the principal and interest on the first mortgage in favor of The Mutual Benefit Life Insurance Company, and partly to the payment of the principal and interest on the debt owing to the defendant bank. Finally, Mr. Holden became hopelessly in default.

A foreclosure was about to be commenced in Shawnee county, Kansas, by the Mutual Benefit Life Insurance Company on its first mortgage on the Shawnee county lands. (Record, p. 224.) Proceedings were also begun by Corrigan to sell the Jackson county, Missouri, land, under the provisions of a trust deed in his favor. (Record, p. 232.)

The indebtedness of Mr. Holden to the defendant bank was also long past due. At this juncture the bank, in order to protect its securities, was obliged to take care of the first liens on all the land in question. Accordingly it advanced to The Mutual Benefit Life Insurance Company the full amount due on its first lien on the Shawnee county, Kansas, lands, including the costs and expenses of the pending

foreclosure suit, and took an assignment of the Insurance Company's mortgage. It also paid off the first lien on the Jackson county, Missouri, land, including the costs accrued in the foreclosure of the trust deed by Corrigan, and took an agreement from Mr. Holden that the title to that land already held by the cashier of the bank as security for previous advances, should be held for the amount advanced to pay off the Corrigan loan.

2. The Inter-State Trading Company was organized by the men interested in the bank, for the purpose of taking the title to the real estate which the bank, at various times, was obliged to take in settlement of debts which the original borrowers were unable to pay in any other way. The custom of the bank was to take various notes from the Trading Company, representing in each instance the amount of the debt for which the real estate was taken in settlement. The Trading Company paid the bank interest on these notes as the same became due, and kept the notes promptly renewed, so that the bills receivable of the bank did not show any overdue indebtedness in such

cases. Whenever any real estate was sold by the Trading Company, the proceeds of such sale were applied to the payment of the particular note given by the Trading Company to the bank at the time it acquired title to the land sold.

3. After the foreclosure proceedings had been commenced by the holders of the first liens on the real estate in question, and the bank had been obliged to take up these liens in order to protect itself, it began negotiations with Mr. Holden for a settlement of the whole matter by a purchase of the lands. The parties reached an agreement on the subject on the 12th day of May, 1904, which was reduced to writing. (Record, p. 22.) By this agreement all of the securities held by the bank were to be transferred to The Inter-State Trading Company in full payment of the indebtedness of Mr. Holden to the bank.

On May 14th, 1904, a written agreement was entered into by all the interested parties, placing the title deeds to all the lands in question n escrow with one James A. Patton, until July 9th, 1904, to be disposed of at the end of that period according to the terms of the escrow

agreement. (Record, pp. 25, 26.) The time for the delivery of the title papers under this escrow agreement was extended by written stipulations until October 11th, 1904. (Record, p. 27.) These title deeds were finally delivered by Mr. Patton to the parties designated in the written agreement. In this manner the title to the lands in controversy became vested in The Inter-State Trading Company.

Thereafter the defendant bank was placed in the hands of a receiver, and some time afterwards this suit was begun. The bank was afterwards reorganized, taken out of the hands of a receiver, and turned back to the stockholders. However, pending the receivership the Comptroller of Currency required the stockholders to take up the note of The Inter-State Trading Company, which represented the Holden indebtedness, together with other similar notes, and to make the assets of the bank good by paying into the bank a sufficient amount of money to cover the notes thus withdrawn. In order to secure the funds to meet this requirement of the Comptroller of Currency, the land in question was sold by The Inter-State Trading Company to The Terrace City Realty and Se-

curities Company. At the time of the trial of this case in the District Court of Shawnee county, Kansas, The Terrace City Realty and Securities Company had succeeded to the rights and interests of the defendants. (Finding of Referee No. 34, Record, p. 234.)

4. Prior to the final hearing of the case in the District Court of Shawnee county, Kansas, the appellants, proceeding under Section 365 of the Code of Civil Procedure of the State of Kansas, procured an order against the defendant bank for the inspection of its books of account, containing a record of the dates and amounts of all payments of principal and interest made on the Holden indebtedness. Under this order, a discovery was had, and the bank was compelled to submit all its books of account to the inspection of the appellants, and the facts thus procured were introduced in evidence. (Record, p. 65.) Section 365 of the Code of Civil Procedure reads as follows:

"Either party or his attorney may demand of the adverse party an inspection, and copy or permission to take a copy of a book, paper or document in his possession, or under his control, containing evidence relating to the merits of the action, or defense therein. Such demand

shall be in writing, specifying the book, paper or document with sufficient particularity to enable the other party to distinguish it; and if compliance with the demand within four days be refused, the court or judge, on motion and notice to the adverse party, may in their discretion order the adverse party to give to the other within a specified time an inspection and copy or permission to take a copy of such book, paper or document; and on failure to comply with such order the court may exclude the paper or document from being given in evidence, or if wanted as evidence by the party applying may direct the jury to presume it to be such as the party by affidavit alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness."

5. Neither the referee nor the District Court of Shawnee county, Kansas, made any findings of fact upon the question of usury, but made the conclusions of law, as follows:

"1. The plea of usury is not available to plaintiffs in this action.

"2. The plaintiffs are estopped from claiming that there was any usury charged or collected by the defendant bank." (Rec., p. 239.)

While the Supreme Court of the State of Kansas, in its opinion, states, "Usury was charged and collected upon the Holden note," there is nothing in the record to justify this

statement, since there was no finding either of the referee or of the court below, upon the subject. The case was tried in the Supreme Court upon a mere *abstract*, containing a part only of the evidence in the case. It is believed that this statement, in the opinion of the Supreme Court of the State of Kansas, was a rather careless statement, intended to convey the idea that if there was usury charged and collected on the Holden note, it was quite immaterial under the circumstances in this case. We do not believe that a fair interpretation of all the evidence in this case will show that any usury whatever was charged on the Holden note. However, if by any construction of the Missouri statute it should be determined that the interest charged and collected at any time was slightly in excess of the legal rate, it will further appear that such interest was *paid*, and did not inhere in any of the notes in existence at the time of the agreements of May 12th and 14th, 1904. This suit was brought February 13th, 1908, (Record, p. 3,) so that any cause of action against the bank for the recovery of usurious interest was barred long before the commencement of this suit.

POINTS AND AUTHORITIES.

I.

Where usurious interest has been collected by a national bank, the exclusive remedy is a penal suit to recover double the amount of interest paid.

Barnet v. Bank, 98 U. S. 555.
Driesbach v. Bank, 104 U. S. 52.
Stephens v. Bank, 111 U. S. 197.

II.

Where the usurious contract is executory, the borrower can only recover in an equitable action to redeem after payment or tender of the sum borrowed, with legal interest.

Tiffany v. Boatman's Savings Institution, 18 Wall. 375.
Hubbard v. Todd, 171 U. S. 501.
Norman v. Peper, 24 Fed. 404.
Story's Eq. Jur., Sec. 301.

III.

The rule that the borrower will be permitted to recover in an equitable suit, only upon the tender or payment of the principal sum, with

legal interest, is strictly applied where a discovery is asked.

Eiseman v. Gallagher, 24 Nebr. 79.
Roger v. Rathbun, 1 Johns. Ch. 368.
Masters v. Prentiss, 55 N. C. 62.
Bowen v. Kendall, 3 Fed. Cas., No. 1724.

IV.

The fact that a statute declares all interest forfeited does not affect the operation of the equitable rule that the payment or tender of the principal, with legal interest, must be made before a recovery can be had.

39 Cyc. 1012.
Cushman v. Sutton, 46 Ill. 256.
Carner v. Brady, 104 N. C. 219.
Anthony v. Lawson, 34 Ark. 628.
Welch v. Wadsworth, 30 Conn. 149.
Wilson v. Hardesty, 1 Md. Ch. 66.
Sporrer v. Eifler, 1 Heisk. 633.
Turner v. Merchants Bank, 126 Ala. 397.
Scott v. Nesbit, 2 Bro. Ch. 642.

ARGUMENT.

I.

Counsel for appellants state in their brief, that "There is absolutely no dispute about the facts in this case."

As we shall see hereafter, this statement is entirely too broad. Only a small part of the evidence is contained in the record before this court. It is quite true that the Supreme Court of the State of Kansas, in its opinion stated, "Usury was charged and collected upon the Holden note." (Record, p. 260.) If this statement is to be regarded as a finding of fact, then, of course, there can be no dispute upon that subject. If, however, this question as to whether or not usury had been "charged and collected" upon the Holden note was an open one at this time, the appellees would contend most strenuously that there was no usurious interest charged or collected at any time by the National Bank of Commerce on the Holden note. The bank, all through the trial of the case in the courts below, strenuously contended that no

usurious interest had been either charged or collected, and the evidence upon the subject was conflicting. The appellants, however, have only abstracted the evidence of their own witnesses on this subject, and none of the evidence produced by the bank is mentioned or referred to in the abstract of the evidence to this court.

Assuming, for the purpose of this argument, that the statement or finding by the Supreme Court of Kansas is final and conclusive upon all the parties at this time, it follows that this court must decide the case upon the theory that usury was "charged and *collected*" on the Holden note. Under the well-established construction of Section 5198, Revised Statutes of the United States, being that part of the national banking act relating to the consequences of taking usurious interest, the only remedy available in such cases is a penal suit. In the case of *Barnet v. Bank*, 98 U. S. 555–559, this court, construing that section, said:

"The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are

alike obligatory upon the parties. While the plaintiff in such cases, upon making out the facts, has a clear right to recover, the defendant has a right to insist that the prosecution shall be by a suit brought specially and exclusively for that purpose, where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case and mislead the jury to the prejudice of either party."

Again, in the case of *Driesbach v. Bank*, 104 U. S. 52–54, the court said:

"The object of the plaintiffs in error in these suits is to have usurious interest *paid* a national bank on renewing a series of notes of which those now in suit are the last, applied in satisfaction of the principal of the debt. The claim is not for interest stipulated for and included in the notes sued on, but for the application of what has actually been *paid* as interest to the discharge of principal. This, we held in *Barnet v. Bk.*, 98 U. S. 555, could not be done."

In *Stephens v. Bank*, 111 U. S. 197–199, this court said:

"All the other defenses are covered by the decision of this court in *Barnet v. Bank*, 98 U. S. 555. . . . The ground of that decision was, that as without the statute there could be no recovery from the Bank for usurious interest actually paid, and as the statute which

created the right to such a recovery also prescribed the remedy, that remedy was exclusive of all others for the enforcement of that right."

It will be noticed that the finding of the Supreme Court of Kansas was that usurious interest had been "charged and collected," *i. e.*, paid.

From a consideration of the cases above cited, it follows that in the present action the borrower is not entitled to have any usurious interest paid by him, credited on the principal of his debt.

II.

If we were to go further and assume that usurious interest had been charged by the Bank and carried into the various renewals of the Holden note, including the last renewal, nevertheless, under the well-established rule of equity the borrower would not have the right to a decree authorizing him to redeem except upon payment of the sum borrowed, with legal interest.

The rule is clearly stated by this court in the case of *Tiffany v. Boatman's Savings Institution*, 18 Wall. 375–391, as follows:

"But it does not follow in cases of usury, if the contract be executed, that a court of

chancery, on application of the debtor will assist him to recover back both principal and interest. To do this would be to aid one party to an illegal transaction and to deny redress to the other. Courts of equity have a discretion on this subject, and have prescribed the terms on which their powers can be brought into activity. They will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money lent with legal interest. Nor, if the contract be executed, will they enable him to recover any more than the excess he has paid over the legal interest."

The same rule was recognized by this court in the case of *Hubbard v. Todd*, 171 U. S. 501, where the following language is used:

"This was not a proceeding to enforce an alleged usurious agreement, but it was a petitioner who sought the affirmative aid of equity, which he could only obtain by doing equity."

Again, in the case of *M. K. & T. Trust Co. v. Krumseig*, 172 U. S. 357, the court said:

"Undoubtedly the general rule is that courts of equity have a discretion on this subject, and have prescribed the terms on which their powers can be brought into activity. They will give no relief to the borrower if the contract be executory, except on the condition that he

pay to the lender the money lent with legal interest."

In the case of *Norman v. Peper*, 24 Fed. 404, Circuit Judge CALDWELL stated the rule as follows:

"Assuming, but not deciding, that the notes and mortgage are usurious, the plaintiffs cannot have the relief they seek, viz., a perpetual injunction against its foreclosure by notice and sale, without first paying or tendering the amount of the debt and legal interest."

This rule applies with special force in all cases where a discovery is asked, it being a fundamental doctrine that courts of equity will not compel a person to disclose facts which will subject him to penalties or forfeitures. The following cases are directly in point:

Iseman v. Gallagher, 24 Neb. 79.
Roger v. Rathbun, 1 Johns. Ch. 368.
Masters v. Prentiss, 55 N. C. 62.
Bowen v. Kendall, 3 Fed. Cas., No. 1724.

In the case at bar, the appellants asked and were given relief by way of discovery, under the provision of Section 365 of the Code of Civil Procedure of the State of Kansas, which, under the practice of that State, supersedes the old method of procedure by Bill of Discovery.

This rule has been expressly approved by the courts of last resort in a majority of the States of the Union, and is too well established to need further citation of authorities.

In a number of States the rule above stated has been abrogated, either wholly or in part, by express statutory enactment. Such, for instance, as the law in Minnesota, which provides as follows:

"Whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt has been taken or received in violation of the provisions of this act, the court shall declare the same to be void, and enjoin any proceeding thereon, and shall order the same to be canceled and given up."

This was the statute construed by the Supreme Court of the State of Minnesota, as sufficient to abrogate the general rule of equity above mentioned, and as authorizing the courts of equity in that State to enforce forfeitures in equitable actions brought by the borrower to cancel security held by the lender. This court in the case of *I. K. & T. Trust Company v. Krumseig*, 172 U. S. 357, held that it was bound to adopt this construction of the

statute in a case appealed from that State upon the well-known principle that the courts of the United States always follow the construction of the domestic laws of a State put upon them by the highest tribunal of such State.

Such statutes, however, have always been considered highly penal, and subject to a strict construction. However, no statute of the United States or the State of Kansas has ever undertaken to modify or change this general rule of equity, and the same has been expressly recognized in this court, as shown by the citation from *Hubbard v. Todd* and *Tiffany v. Boatman's Institution*, *supra*, and the decision of the Supreme Court of Kansas now under consideration.

III.

The authority of the court of equity to require the payment of principal and legal interest before exercising its discretion to permit a redemption, is not dependent upon any statutory authority.

"Our courts have followed the general prevailing and well-settled rule that such remedy will be afforded to a complainant only upon the condition of his paying the amount equitably due, which is considered to be the same as the

loan, with legal interest. The authority of a court of equity to impose those terms is not conferred by the statute, nor is it exercised for the purpose of enforcing any contractual right." *Lindsay v. U. S. Savings & Loan Ass'n*, 51 L. R. A. (Ala.) 394.

"Such authority belongs to the court by virtue of its general equity jurisdiction, and, unless a statute exists providing that the party may have relief without imposition of those terms, the rule will be invariably enforced." Tyler, *Usury*, 437.

There is no statute, either of the United States or of the State of Kansas, forbidding courts of equity to impose any terms they choose as a condition upon which they will exercise their discretion to permit a redemption from a deed, absolute on its face. It is a matter coming wholly within the jurisdiction of State courts.

In granting the relief asked for in this case, the courts of Kansas authoritatively interpreted the law of Kansas. In that State, the rule is well established that where a borrower invokes the jurisdiction of a court of equity in a suit brought against the lender, for the purpose of having a deed, absolute on its face, decreed to be a mortgage, and for a cancellation of the

same, the relief will be granted only upon the payment of the debt, with legal interest. (*Holden Land and Live Stock Co. et al. v. Inter-State Trading Co.*, 87 Kan. 221.)

It seems to be claimed by counsel for appellants that the Federal statute on the subject of usury amounts to a legislative enactment on the part of Congress abrogating the rule of equity prevailing in the State of Kansas, so far as a national bank is concerned; and further, that it amounts to a command that a court of equity in the State of Kansas shall exercise its discretion to permit a redemption as against the national bank without requiring, as in other cases, the tender or payment of the actual debt with legal interest.

That the Federal statute was not designed to interfere in the least with the exercise of the jurisdiction of the courts of the several States, in granting equitable relief, is too plain to need argument. Whether Congress would have the power to prescribe rules for the government and control of State courts in the exercise of their general equitable jurisdiction, may well be doubted. That Congress has never attempted to do such a thing, is perfectly plain.

The Federal statute simply provides for a forfeiture of all interest carried with the note. It applies when the lender brings a suit to enforce the contract. Provisions for the forfeiture of interest, and even of the principal, have been characteristic of the usury laws of many of the States. But these provisions have not been held to prevent the application of the general rule of equity, to the effect that where the borrower asks for relief against the lender, in an action for cancellation of a deed, absolute on its face, he will be accorded the relief only upon payment of the actual debt with legal interest.

In some of the States, statutes have been passed providing that the party may have relief without the imposition of the terms stated in the equitable rule under consideration. Of this character is the law in Minnesota, which was brought under review in the case of *M. K. & T. Trust Co. v. Krumseig, supra.* This court in that case simply held that it was bound to follow the construction of the Minnesota statute adopted by the Supreme Court of that State, thereby recognizing the rule we are contending for here, to wit, that the local law must govern

in the matter of granting equitable relief. Similarly, the laws of New York and Arkansas have abrogated the general rule of equity for which we contend. However, with the exception of States where the local laws, or the construction put upon such laws by the Supreme Court of such States, constitute a statutory modification of the general rule, no decision can be found denying the right of a court of equity to impose such terms as it deems right and just, as a condition precedent to the allowance of the relief sought.

The doctrine that this court will not construe a Federal statute in such a way as to modify the local laws of the State or affect its domestic policies, is well illustrated in the recent case of *Southern Pacific Co. v. Schuyler*, 227 U. S. 601. In that case a man was riding on a passenger train under circumstances which constituted a violation of the Hepburn act. He was charged with being guilty of misdemeanor in using free transportation at a time and place forbidden by that law. Likewise, that the Railway Company was guilty of a misdemeanor in permitting him to ride. Nevertheless, the Supreme Court of Utah held that the man was not a trespasser,

but was entitled to the protection accorded to passengers. This court held that the local law was controlling, and that the Hepburn act did not modify or affect the general policy of the courts of Utah in granting the relief sought in that case.

"The fact that the statute declares all interest forfeited, or that contracts tainted with usury shall be deemed void, . . . does not affect the operation of the rule." (39 Cyc., p. 1012.)

In the case of *Cushman v. Sutton*, 46 Ill. 256, the court stated the law as follows:

"Where a mortgagor is seeking to redeem, and alleges usury, from which he seeks relief, although the statute under which the usury was reserved declared a forfeiture of all the interest, yet he will be required to pay six per cent, on the principle that he who asks equitable relief should do equity, and equity would require him to pay legal interest."

To the same effect may be cited the following cases:

Carver v. Brady, 104 N. C. 219.
Anthony v. Lawson, 34 Ark. 628.
Welch v. Wadsworth, 30 Conn. 149.
Wilson v. Hardesty, 1 Md. Ch. 66.
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For the reasons given, we respectfully submit that the decision of the Supreme Court of Kansas should be affirmed.

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